AUG 16 1966
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LEROY TEALE,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONERS

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(In Forma Pauperis)

To the Honorable Chief Justice Earl Warren and to the Honorable Associate Justices of the Supreme Court of the United States:

Your petitioners, Ruth Elizabeth Chapman and Thomas LeRoy Teale, have petitioned this Honorable Court to reverse the judgment of death now pending against Thomas LeRoy Teale and the judgment of life imprisonment now pending against Ruth Elizabeth Chapman, jointly tried in the Superior Court of the County of San Joaquin, State of California, for the crimes of murder, kidnaping and robbery.

Stay of execution was granted by this Court as to the sentence of death of Thomas LeRoy Teale on December 3, 1965.

Each petitioner is a pauper and was allowed to proceed in the Superior Court in forma pauperis during the trial of the case. Petitioners have been granted leave to proceed in forma pauperis on this appeal.

The Superior Court of the County of San Joaquin appointed Richard E. Johnson, of 315 Wells Fargo Bank Building, Stockton, California, to represent Ruth Elizabeth Chapman, and Nels Fransen, of the firm of Simonelli and Fransen, of 115 North Sutter Street, Stockton, California, to represent Thomas LeRoy Teale, as court-appointed attorneys. Both of these men are outstanding and devoted attorneys to their clients. Each has carried the case through the Supreme Court of California, which has affirmed the judgments of death and life imprisonment, respectively. They have asked present counsel to carry this case to the Supreme Court of the United States similar to the request made by the Public Defender in Los Angeles County in the case of *Eddie Dean Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106, and this counsel has accepted and agreed to the task.

These counsel have both assisted counsel eminently and devotedly in this case. Their names should appear on the briefs as of counsel.

Opinions Below

The original opinion of the Supreme Court of California was set forth in 63 A.C. No. 4, page 175, a copy of which opinion is set forth in Appendix A hereof.

The opinion of the Supreme Court of California modifying its original decision was rendered August 27, 1965 and is reported in 63 A.C. No. 8, page 269, a copy of which opinion is set forth in Appendix B hereof.

The opinion as modified appears in 63 Cal.2d 178, a copy of which modified opinion is set forth in Appendix C hereof.

Jurisdiction

Jurisdiction is conferred on this Court by Title 28, Section 1257(3), U.S. Code.

The judgment of the Supreme Court of California was rendered on July 16, 1965. Petition for rehearing was duly and regularly filed on behalf of Ruth Elizabeth Chapman on July 26, 1965 and a petition for rehearing on behalf of Thomas LeRoy Teale was filed on July 27, 1965. In a modification of its opinion, the Supreme Court of California admitted that the trial court and District Attorney had violated this Court's decision in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, but declared it non-prejudicial and upheld the verdicts of life imprisonment and death, respectively. Both petitions were thus denied on August 27, 1965.

A petition for writ of certiorari was duly filed in this Court, which petition was granted on March 28, 1966, No.

875 Misc., October Term, 1965. Both petitioners are now in California prisons, awaiting this Court's decision. A stay of Mr. Teale's sentence of death was granted by Justice Douglas to await the outcome of this case.

Constitutional Provisions and Statutes Involved

In Appendix D hereof are the statutes and constitutional provisions involved, to-wit: The Fifth Amendment to the Constitution of the United States; the Fourteenth Amendment to the Constitution of the United States; Article 1, Section 13 of the California Constitution; Article 6, Section 4½ of the California Constitution; and Sections 187, 207, 209, 211 and 825 of the Penal Code of California.

Questions Presented

The Court has limited the questions to two.

However, inherent in these questions is the application of Article 6, Section 4½ of the California Constitution, which we have set forth also in Appendix D hereof.

The questions, as limited by the Court, are:

Where there is a violation of the rule of *Griffin* v. *California*, No. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?

It is petitioners' position that violation of a constitutional right is *per se* harmful and prejudicial.

In this case the error was particularly harmful and prejudicial throughout.

The case was entirely circumstantial. The prosecutor used the constitutional right of silence of the defendants to

support and prop up his circumstantial evidence case. This is forbidden by the Fifth and Fourteenth Amendments to the Constitution of the United States.

Griffin v. *California,* 380 US 609, 14 L.ed.2d 106.

Summary Statement of the Case

The petitioners, Ruth Elizabeth Chapman, under life sentence, and Thomas LeRoy Teale, under sentence of death, respectfully ask this Court to reverse the judgments below for violation of their constitutional rights under the Fifth and Fourteenth Amendments to the United States Constitution.

Ruth Elizabeth Chapman was arrested and taken into custody on October 26, 1962, in St. Joseph, Missouri. Her arrest was on a felony warrant for robbery, kidnaping and murder of Billy Dean Adcock, a bartender. (C.T. 1-2a) She was brought back to California in the custody of Lodi, California, officers and a California Deputy District Attorney named Kenneth Ferguson. She was not taken into court or arraigned for several days,[1] nor was she supplied with any attorney to represent her.[2] Instead, she was taken,

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[1] California law requires prompt arraignment before a magistrate, who advises defendants of their constitutional rights. (Secs. 858-859 California Penal Code.)

[2] Article 1, Section 13, California Constitution, and Section 859, Penal Code, require an attorney. Section 859 states: "'Time to Procure Counsel.—When the defendant is charged with the commission of a public offense, over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the com-

at the request of the County District Attorney, to the offices of Dr. Ralph K. Winkler, a psychiatrist, in Stockton, and given a psychiatric examination and questioned for several hours regarding the events involved in the charges.

Prior to this examination, she was not advised of her right to counsel nor of her constitutional right to remain silent, nor was she furnished with the advice or assistance of any attorney nor was she taken into court to be arraigned, where she could be informed of her constitutional and statutory rights.[3]

Petitioner Chapman made a long and detailed statement of 84 pages to the Deputy District Attorney after her arrest, without having the benefit of counsel and without the advice of counsel and without being advised of her rights. This statement was given to the psychiatrist, who used it as the basis for his interrogation, which later became the subject of court testimony when the psychiatrist was called by the prosecution as a witness for the People and testified to the statements which she made to him, all without benefit of counsel.

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plaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer must, without delay and without fee, perform that duty. If the defendant desires and is unable to employ counsel, the court must assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor."

[3] *Escobedo* v. *Illinois*, 378 US 478, 12 L.ed.2d 977.

A Deputy Public Defender was appointed three weeks later, on November 16, 1962, and withdrew on January 29, 1963. Attorney Richard E. Johnson was then appointed by the court as counsel for petitioner Chapman. However, the statement which Mrs. Chapman made to the psychiatrist and which found its way into evidence against her and with its effect upon petitioner Teale, who was tried jointly with her, had already been taken.

Mrs. Chapman's attorney presented a defense of amnesia. The psychiatrist, Dr. Ralph K. Winkler, agreed that she had amnesia, but testified that, based upon her statement, he thought she developed amnesia after, rather than before, the alleged crime. Her attorney was not allowed to cross-examine the psychiatrist on her statement and thus was denied the right of confrontation and cross-examination. It is petitioners' contention that this statement violated the rule of *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106, and its use in any form was highly prejudicial, using as it did the words of the defendant herself, through the psychiatrist, to convict her.

Petitioner Teale was arrested on or about November 2, 1962 in New Orleans, Louisiana. Both defendants were charged with the murder of Billy Dean Adcock, a bartender. Adcock worked from 6:00 p.m. to 2:00 a.m. at the "Spot Club" in Lodi, County of Joaquin, State of California. (R.T. 972) He was found dead on Dillard Road in Sacramento County at 9:30 a.m. on October 18, 1962. (R.T. 922) Mr. Adcock's body was in a drainage ditch. Death was caused by gunshot wounds to the head. (R.T. 714) Time of death was estimated between 2:30 a.m. and 3:00 a.m. on October 18, 1962. (R.T. 722) Expert testimony established

that the bullets entering the victim's head were .22 caliber shots. (R.T. 1284)

The owner of the "Spot Club" arrived at the premises at 9:00 a.m. on October 18, 1962 (R.T. 984) for the purpose of balancing out the till. (R.T. 984) The owner observed Adcock's automobile parked near the front of the Spot Club, which was unusual. (R.T. 1003) Upon entering, he saw a drawer from the cash register resting on the top of the bar. (R.T. 985) The owner *estimated* that he was short about $200. (R.T. 998) However, his safe was unlocked and still contained approximately $400. (R.T. 986)

When defendant Teale was arrested in New Orleans on November 2, 1962, he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased a .22 caliber weapon, and he was driving the automobile which had been in the petitioners' possession before and at the time of the killing.

After his return to California, Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill (the deceased), and he (Teale) told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they

pulled up and stopped, that he opened the door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more time."

The prosecutor argued that Teale did not take the stand to deny this. What could be more prejudicial to both defendants or seek to convict them out of their own alleged mouths?

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. The argument was further made that Teale's silence confirmed this.

The petitioner Teale's defense was a denial of the commission of the homicide. Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a

"disassociative reaction"; that when she found herself in an uncontrollable situation she would "'black out' by simply not knowing."

The case against the two defendants was entirely circumstantial. At the close of a long line of People's witnesses, neither defendant took the witness stand.

~~Although~~ This Court had held in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, that the Constitution of the United States, under the Fourteenth Amendment, forbids the use by a state of a man's or woman's own statements to convict him or her, ~~the prosecutor in this case, nevertheless, proceeded to ignore the rulings of this high Court, as did the trial judge.~~ The prosecutor apparently felt his circumstantial evidence was not strong enough without one additional link, to-wit: the failure of the defendants to take the witness stand. The prosecutor sought to have the jury consider the silence of the defendants, on their standing on their constitutional rights, as a ground to convict them. The complete argument and comments by the prosecutor on the defendants' failure to take the witness stand is contained in Appendix E hereof, and made a part of this brief.

Summary of Argument

I.

The State of California admits that, after the *Griffin* case was decided and ruled upon by this Court, it violated the constitutional provisions decided in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, that comment on the failure of a defendant to take the witness stand violated the Fifth and Fourteenth Amendments to the Constitution of the United States. Prejudice is presumed from the violation of a constitutional right and requires reversal of the judgments below in order to preserve and protect that right.

II.

This was a circumstantial evidence case. Neither defendant took the witness stand, but relied on their constitutional rights not to be required to incriminate themselves. Nevertheless, the prosecutor took each circumstance and, after pointing it out, contended and supported his contention that the defendants' failure to testify constituted proof that the defendants were guilty or otherwise they would have taken the witness stand. He repeatedly stressed the point that only the defendants knew what happened and could raise their right hand and testify and, having failed to do so, he contended that this proved their guilt. Thus he used the rights given by the Constitution of the United States under the Fifth and Fourteenth Amendments as a weapon against them. This he is not authorized to do. The great prejudice that occurred to each defendant from this repeated argument of the prosecutor regarding the failure of the defendants to testify was used by him to

influence and convince the jury. He cannot now be permitted to say it was not prejudicial.

The trial judge also committed prejudicial error in giving an instruction out of *People* v. *Adamson*, 27 Cal.2d 478 (aff'd 332 US 46, 91 L.ed. 1903), which case has been disapproved by this Court in *Malloy* v. *Hogan*, 378 US 1, 12 L.ed.2d 653. This also prejudicially affected the jury in giving the jury the right to determine guilt from the exercise of the defendants' constitutional privileges.

ARGUMENT

It is admitted that the argument covering the self-incriminating point covered practically every point made by the prosecutor and that it violated this Court's decision in *Griffin* v. *California*, 380 US 609, 14 L.ed.2d 106, *Malloy* v. *Hogan*, 378 US 1, 12 L.ed.2d 653, and *Murphy* v. *Waterfront Commission of New York*, 378 US 52, 12 L.ed.2d 678. But the State still seeks to evade this Court's decision in *Griffin* v. *California*.

The prosecutor thought his circumstantial evidence case was not strong enough without using this argument or he would have dispensed with it as surplusage. Surely, it cannot now be claimed that even though the constitutional rights of the defendants were shockingly violated in an effort by the prosecutor to lift up his case by comment on the failure of the defendants to testify as evidence against them, that now that he has succeeded in having the jury reach a verdict of guilty, with a death sentence as to Teale and life as to Mrs. Chapman, that he can now claim, and the Court can dispense with the violation on the grounds that it is not "prejudicial".

The argument we make is very clearly supported by analogous language of this Court in *Bram* v. *U.S.*, 168 US 532, 42 L.ed. 568, wherein this Court stated:

> "It is also clear that in determining whether the proper foundation was laid for its admission, we are not concerned with how far the confession tended to prove guilt. Having been offered as a confession and being admissible only because of that fact, a consideration of the measure of proof which resulted from it does not arise in its admissibility. If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was not prejudicial because it did not tend to prove guilt."

By analogy, the same principle applies here. The prosecutor having offered the comments on the failure of the defendants to take the witness stand, on the one hand, to prove guilt, and which by the very offer is vouched for as tending to that end, cannot on the other hand, now, for the purpose of avoiding the consequences, be heard to assert that the matter offered was not prejudicial because it did not tend to affect the jury.

It is stated in *Miller* v. *Territory of Oklahoma*, 149 F. 330:

> "The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts them to an insistence

upon the admission of incompetent evidence, or getting before the jury some extraneous fact supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met by the stereotyped argument that it is not apparent it in any wise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, it was harmless. As the appellate court has not insight into the deliberations of the jury room, the presumption is to be indulged in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty."

The foregoing case is cited with favor in California in *People* v. *Glass,* 158 Cal. 650, 659.

The theory of the State of California is that a little poison may be all right, but too much will kill and therefore they should be allowed to use a restrained quantity of it and let them be the judge of what quantity they use. But constitutional rights are guarantees which our forefathers placed there without limitation. The Fifth Amendment does not state that testimony obtained by means of self-incrimination or by the failure of the defendant to incriminate himself may be used and then dispensed with at the whim or will of the prosecution or the trial judge. It is the sacred guarantee in the preservation of all human rights. The violation of a constitutional right is a wrong

so fundamental that it makes the whole proceeding a mere pretense of a trial and renders conviction and sentence wholly void.

Chambers v. *Florida,* 309 US 227, 84 L.ed. 716;
Faye v. *Noia,* 372 US 391, 9 L.ed.2d 837, 854;
Moore v. *Dempsey,* 261 US 86, 67 L.ed. 543;
Massiah v. *U.S.,* 377 US 201, 12 L.ed.2d 246;
Escobedo v. *Illinois,* 378 US 478, 12 L.ed.2d 977;
Powell v. *Alabama,* 287 US 45;
Gideon v. *Wainwright,* 372 US 335, 9 L.ed.2d 799.

What has been said with relation to violation of a constitutional right being *per se* prejudicial is further supported by California practice, particularly in this case where the verdict is a general one and one has no means of psychoanalyzing the jurors to find out what bit of evidence or what bit of argument swayed them.

The comments of the prosecutor in this case are replete with admitted violations of the Fifth and Fourteenth Amendments to the Constitution of the United States, prohibited by this Court's decision in *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106. Neither defendant took the witness stand, but the prosecutor, in each point that he argued, strongly emphasized their failure to take the witness stand as the basis of a request for conviction and the death penalty.

Thus, the prosecutor said:

> "So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult

task from the very only two people remaining who were at the scene, *but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.*" (R.T. 2257)

And again:

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. . . . It might have been helpful to know who pulled that trigger, . . . and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that." (R.T. 2258-2259)

And:

"You like to know that persons get—if there is something about their background that they can tell you, . . . you like to hear it from them, . . . and the fact that they chose to rest upon whatever evidence there is here in the case in chief is *something that you can consider in deciding whether or not they have been fair with you.*

"This is the chance that they take by not having taken the stand." (R.T. 2288)

The prosecution denied Mrs. Chapman's repeated efforts to get a speedy trial after her arrest, for she once had a nervous breakdown and she was anxious to have her case tried as guaranteed by the Constitution of California and the Constitution of the United States.

Article 1, Section 13, California Constitution;
People v. *Fegelman*, 66 Cal.App.2d 950;
Harris v. *Municipal Court*, 209 Cal. 55.

Nevertheless, the court kept delaying her trial so that she had another nervous breakdown in the middle of the trial. She was given tranquilizers, as shown by the report to the court during the trial. (C.T. 329) She collapsed 22 days after the trial commenced, which was 82 days after her affidavit stating that she wanted a speedy trial and intended to testify, if given one. However, by the time that the trial took place Mrs. Chapman, with the knowledge of the prosecution, was in no physical or mental condition to take the witness stand due to the delay by the prosecutor himself in bringing her case to trial. In spite of this fact, which was within the knowledge of the judge and the prosecutor but not the jury, the prosecutor commented upon her failure to testify, commenting as follows:

> "Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. *Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court.*" (R.T. 1827)

Mrs. Chapman was the first of the two defendants arrested. After her arrest, the prosecutor arranged to have her examined by psychiatrists. During the trial of the case the psychiatrist, Dr. Ralph K. Winkler, was placed on the witness stand and testified as follows:

By Mr. Drivon, the prosecutor:

"Q. Now you were, *at the request of my office,* asked to make a psychiatric examination of the defendant Ruth Elizabeth Chapman, is that correct? (Emphasis added.)

"A. Yes, sir.

"Q. And when was that, and where, and how long did it take, and of what did the examination consist?

"A. This examination was conducted on October the 31st of 1962. It took place in my office in Stockton State Hospital. The examination took a little over a two-hour period. It consisted of taking pertinent background information from the patient of a historical nature, the general interview situation and the general mental examination. (R.T. 1767) . . . .

"The question which came to my mind was when did this loss of recall occur, and *I had to take into consideration the statements and the history which she had given me.*

"Now, it seemed apparent to me that during a period prior to the loss of recall or amnesia, whichever we want to term it, that Mrs. Chapman would be capable of forming an intent. During the actual period when there was a loss of recall, there is still a possibility that within that specific period of time she could form intent, but the intent would not be related to the previous period. Does this answer . . . (R.T. 1768-1769)

. . .

"A. Going by the statements which Mrs. Chapman gave to me, she claimed a loss of recall for the period following her hearing a shot being fired while she was driving an automobile.

"Q. I see. Did she relate to you, Doctor, or she did relate to you, did she not, the period of time, the history of going from Ukiah to Reno, and then Tonopah and Las Vegas and then Fresno and then to Croce's Cafe in Lodi, and then into another club and where a person was abducted, and then driving an automobile and then she hearing a shot fired?

"A. *She related this in quite detail* and this was part of the report I submitted to your office.

"Q. Yes. You did submit a report. (R.T. 1770)

. . .

"Mr. Drivon: I see. Well, the shot to which you refer, you say that the amnesic episode, if it did occur, occurred after the shot she heard prior to while she was driving the automobile, occurred after that in your opinion doctor?

"A. This is my opinion, based on the statement she has given me. (R.T. 1771)

. . .

"Q. Now, this examination—well, I'll withdraw that. This examination, and your opinions drawn therefrom, were primarily from what she told you of the events, and how much she was able to recall, and the specific details, is that correct?

"A. Yes, sir. (R.T. 1774)

. . . .

"Q. Actually, you said that your test—examination was primarily an interview with her, is that correct?

"A. Yes, sir, it was.

"Q. And the history, called data, that you obtained from her?

"A. Yes, sir, it was." (R.T. 1775)

It was during this examination that the psychiatrists obtained detailed information and thereafter testified regarding the alleged crime as it related to both defendants. The psychiatrist testified to his interview and the conversations and statements obtained.

When neither defendant took the witness stand, the prosecutor then commented at length on this fact. Thus, although all of the purported details of the crime were related to the jury through the eyes of a psychiatrist who had examined Mrs. Chapman without benefit of counsel and without her taking the witness stand, the prosecutor then added to this use of self-incriminating information by his comment to the jury, as follows:

> "Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, *but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.*" (R.T. 1864).

Further, at another point, the prosecutor said:

> "Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, whichever way you want to look at it, psychiatrically or otherwise, seems to have

backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Mr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, *the sanctity and worthiness of evidence would have to come from her lips, hers on the stand here.* Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Who said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, *it's an interesting thing that the only witness* who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all." (R.T. 2108)

Although Teale was involved by indirection, the prosecutor repeatedly kept making a point of his guilt of the crime charged by reason of his failure to take the witness stand.

In Appendix E hereof, we have set forth the prejudicial comments of the prosecutor.

The judge used instructions formerly used in California in *People* v. *Adamson,* 27 Cal.2d 478 (aff'd 332 US 46, 91 L.ed. 1903), which this Court has now reversed in *Griffin* v. *California,* 380 US 609, 14 L.ed.2d 106. These instructions were as follows:

"In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element." (R.T. 2163-2164)

Mrs. Chapman's failure to take the witness stand was commented upon extensively by the prosecutor, who had acquired the information from Mrs. Chapman after her arrest.

The prosecutor said:

"Now whether or not Mr. Teale had any other money at the time or was in the habit or concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas LeRoy Teale. Ladies and gentlemen, *he had not seen fit to tell you about that.*" (R.T. 1824)

Again the prosecutor commented:

"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professionals and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on

the stand why he had the weapon with him fully loaded, *because Mr. Teale has never taken the stand in this case and testified for you.*" (R.T. 1854)

In the opinion of the court it was stated:

"The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located."

The prosecutor argued to the jury:

"Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves, so we don't know when they were purchased, or rather, we know the date, but we don't know the exact time or what the sequence was, but this, which I refer to here for the record, People's Exhibit No. 14, is a .32 caliber pistol that was purchased by the defendant Ruth Elizabeth Chapman.

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once

again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both." (R.T. 1808-1809)

On another occasion the prosecutor argued that the deceased was robbed after a struggle:

"You know, ladies and gentlemen, that the next morning, the next morning somewhere between nine and nine-thirty, somewhere thereabouts, Mr. William Moore, just a private citizen, was driving down Dillard Road, and he had been on a job of some kind of air conditioner or something, he had been on a job in that area, and he was driving down the road with a fellow employee, and he saw the dead body of Billy Dean Adcock out on the road. He stopped just long enough to feel in his own mind that this person was dead. He could observe certainly the shirt. It's obviously full of blood. He could observe the body half submerged in the water. His next move was to go to the nearest house, which was some distance away, a mile or so, and have a call placed to the Sacramento Sheriff's Department. You heard the testimony that Deputy Ferrill, who was the first deputy on the scene, the murder scene itself. He observed the papers strewn around the area, he observed the dead body, and he observed that this particular shirt—the one that you have seen—somebody even said they held it up, et cetera, so that you could observe it more clearly. Now, there are a lot more tears in it, but he observed that there was a tear someplace in this area. I believe he said another small one somewhat closer up. As you know now from hav-

ing removed the shirt from the body, having been dead for some time, naturally rigor mortis set in, and with all natural caution, when you remove the shirt from the body there will be some tears, and I am not suggesting or implying that all of the tears that are on there now were involved when the individuals robbed or shot, when he was out on Dillard Road.

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know, I wasn't out there, you were not out there. *You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.*

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they couldn't testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is

not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes." (R.T. 1821-1823)

In reference to the purchase of the gun, the prosecutor argued:

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on why these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen, besides this that I mentioned to you before, that since you have no testimony from the stand, you must sur-

mise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court. Of course, you are the exclusive judges of the facts themselves." (R.T. 1826-1827)

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"To me they are charged with serious crimes, ladies and gentlemen. *They can come up and testify and then it will be evidence for you to consider in this case.* If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination. So, we know that they had the motive. And we know that they had the means and we know that they had, ladies and gentlemen, the opportunity." (R.T. 1829)

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"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, there-

fore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer." (R.T. 1838)

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"Now, ladies and gentlemen, the doctor further testified that in his opinion and from the powder burns that were on the back of the head that it was fired at some distance, and I believe he said something like possibly eighteen inches, something of that sort. If I'm wrong, you can correct me. It was not a great deal of distance, but it was some eighteen inches or so, however, the ones that were fired in the side of the head and as you recall were so close together that upon the initial examination you couldn't tell that there were actually two bullets that went through there, he said were fired within a couple of inches of that head, and he tells that because of the powder burns, how much powder was left on the side of that head. So you can see that whichever one of these defendants shot him, and once again, ladies and gentlemen, here is an area that I don't know who shot him, and you don't know who shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-

examination, so all we know is that one of them shot him." (R.T. 1840-1841)

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"They took Room No. 11, and there was a party of two. We also know, ladies and gentlemen, that we have a motel registration, I'll look quickly and see if I can find it, otherwise I will merely mention it, a motel registration at Ukiah, California. I believe we have it here, the Mountain View Motel, People's Exhibit No. 73, Ukiah, California, date of registration October the 18th. The same day, ladies and gentlemen. The same day. We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't, because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote that name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have even seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination. But as you recall, you certainly can infer when you have no other evidence in the case, ladies and gentle-

men, of the use of any other name, other than Teale or Chapman, in their various trips from motel to motel, this is the first time, ladies and gentlemen, and only a couple of hours after the murder was perpetrated, and the robbery, and the kidnaping, that a phony name was used.

"And it's incidentally a phony license number. There's no evidence that any other name, either Teale or Chapman—they've all been used—the license number has always been correctly stated. No one has ever been able to change that before. We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows a consciousness of guilt. It shows that they are using a name other than their true name and one other than the true license number. A question of detection." (R.T. 1844-1846)

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"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each of you can certainly infer as to what it very readily could mean,

especially if one has in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. *And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand.* She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—" (R.T. 1848-1849)

The prosecutor argued with reference to a gun that Teale had on him at the time of his arrest:

"He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professionals and they know what they are doing and one of them had a gun out and he never had an opportunity

to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand, why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. *If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they are under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it.* I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him and it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is.

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not

desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you you can drawn an adverse inference." (R.T. 1854-1855)

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"But you'll recall that for instance I know the shoes here, they were admitted into Court. There was blood found on them, and you recall the blood down here on the soles, right here, right here, and back in this area, Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence." (R.T. 1861-1862)

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"Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and

gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

"All right. There are the shoes, ladies and gentlemen, we know they had blood on them." (R.T. 1864)

The opinion of the Supreme Court discusses evidence connecting the defendants with the commission of the crime through the evidence that there was type "A" blood on some of the articles.

The prosecutor argued:

"You know there was a fur stole, I believe we have a fur stole over here, I don't know where it came from, Mrs. Chapman didn't testify to it, but we know that a fur stole, apparently this came—apparently this was turned over to Mrs. Mason, . . . " (R.T. 1869-1870)

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"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense." (R.T. 1881)

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"I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So, it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman." (R.T. 2106)

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"The evidence showed here that she bought two guns for Teale. What evidence? *No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself.* This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all." (R.T. 2115-2116)

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"Mr. Hardwick said that when she would have too much to drink he would take her home. She couldn't remember the next day. Here again you are getting the results of this intoxication, and what it amounts to from Ruth Elizabeth Chapman, and hearsay with regard to what she concluded. No one else. We didn't see her on the stand." (R.T. 2119)

During the penalty phase of the case, the prosecutor argued:

"Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too. It might have been important in weighing this very difficult thing which you have to weigh, and I will have a little more to say about that in a moment.

"The motive might have been to perhaps destroy a witness. Now, you can consider that with regard to Ruth Elizabeth Chapman not having had any experience, there is no evidence that she was involved in anything before, her record apparently is clear. At least there is no evidence, not having been involved in this that she would be less likely to have a motive for destroying a witness, for example, than Thomas Leroy Teale, who went through one of these things before and the witness lived, and others lived to testify against him.

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at

the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too." (R.T. 2256-2257)

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"Now, you can consider that as indignation against the defendants. Now, you can consider also that perhaps there were facts for or against these two defendants which have not been brought to light, and one of them I mentioned. You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort. You don't know that as far as pulling the trigger. But, this is a factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that. Was

it an accident—you might have been interested, and I think you would, whether it was an accident. You don't know. Or whether it was deliberate. From the physical evidence, one shot in the back of the head and two in the side, it doesn't seem to indicate an accident. It seems to indicate deliberate." (R.T. 2258-2259)

CONCLUSION

Wherefore, petitioners pray for reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioners

APPENDIX A

Original Opinion of Supreme Court of California

[63 A.C. No. 4, page 175]

APPEALS (one automatically taken under Pen. Code § 1239, subd. (b)) from a judgment of the Superior Court of San Joaquin County. William Biddick, Jr., Judge. Judgment affirmed in part and reversed in part as to one defendant and affirmed as to the other defendant.

Prosecution for murder, robbery and kidnaping. Judgment of conviction of first degree murder, first degree robbery and simple kidnaping reversed insofar as it imposes sentences for robbery and kidnaping on one defendant and affirmed in all other respects as to such defendant; affirmed in all respects as to the other defendant.

Nels B. Fransen, Thomas R. Krehbiel and Richard E. Johnson, under appointment by the Supreme Court, for Defendants and Appellants.

Stanley Mosk and Thomas C. Lynch, Attorneys General. Doris H. Maier, Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Plaintiff and Respondent.

PEEK, J.—Defendants Thomas L. Teale and Ruth Elizabeth Chapman were convicted by a jury of the first degree murder of Billy Dean Adcock, robbery of the first degree and simple kidnaping. A life sentence was imposed upon the defendant Chapman as to the murder count and she appeals from the whole of the judgment. The death penalty was imposed upon the defendant Teale, and his appeal is automatic pursuant to the provisions of section 1239, subdivision (b) of the Penal Code. The order denying defendants' motion for a new trial being nonappealable, the defendant Chapman's purported appeal therefrom must be dismissed. (Pen. Code, § 1237.)

On October 17, 1962, defendants registered at a motel in Fresno, where they gave a bad check in payment of their room rental. At approximately 10 p.m. on that same day

they entered a tavern near Lodi where they remained for nearly three hours and together consumed five bottles of beer. Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here," or "We can't do anything here, let's go." They then left the tavern together.

Defendants next appeared at about 2 a.m. the following day at the "Spot Club" in Lodi. The only persons in the bar at that time were the defendants and Adcock, the bartender. Shortly thereafter three persons, including the bartender and a woman of Mrs. Chapman's general description, were observed in front of the Spot Club. The third person in the group, a man resembling the defendant Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern.

The following morning the owner of the bar found it to be in unusual disarray. The cash register had been broken into and approximately $260 was missing. Papers usually kept in the register were scattered about the floor. Routine housekeeping tasks which the bartender generally completed before leaving had not been performed.

Later that morning the victim's body was found in a remote area north of Lodi. It was half submerged in an open ditch by the side of a road. The clothing was torn and there was blood on the face and on the surface of the road nearby. The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches. The third bullet entered the back of the head from a gun held some 18 inches away. The time of death from the gunshot wounds was estimated at 3 on the morning of the 18th.

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been removed, and a check for $2.00 bearing a stamp "Refer to Maker," which had been signed by Mrs. Chapman.

Evidence connecting defendants with the commission of the crime was submitted by an expert witness for the People who testified that the victim's blood was Type A; that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of defendants' vehicle; that blood had spattered or radiated out from the right front side of the automobile: that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession; that Type A blood was also found on defendant Teale's shirt and jacket; that numerous fibers taken from the victim's shoes matched those found in the defendants' automobile, that hairs were found in the automobile which matched those of the victim; that red paint found on the floor mat of the defendants' automobile came from the shoes of the victim, and that in the opinion of the expert the victim had been in the defendants' automobile.

Defendant Teale was arrested in New Orleans on November 2, 1962. At that time he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased the .22 caliber weapon hereinbefore mentioned, and he was driving the automobile which had been in the defendants' possession before and at the time of the killing.

After his return to California Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill [the deceased], and he [Teale] told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all after-

noon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they pulled up and stopped, that he opened the door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times."

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. No claim is made and the record does not disclose that Teale's fellow prisoner was acting in complicity with the state.

Mrs. Chapman was arrested by an agent of the Federal Bureau of Investigation in St. Joseph, Missouri, on October 26, 1962, and thereafter gave conflicting accounts to the officer of her whereabouts on October 17 and 18. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph. She later stated that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco. However it was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland at 4:40 a.m. on October 18, was made out in her handwriting. The clerk of the

motel also testified that the registrant gave a false license number, and that the automobile in which the parties arrived was the one found in Teale's possession upon his arrest.

The record is mute as to the factual basis for certain of the requirements which must be satisfied before testimony of Mrs. Chapman's statements could have been properly introduced by the prosecution. However, the conflicting testimony relative to her whereabouts on October 17 and 18 was elicited on direct examination from the federal agent appearing as a witness for Mrs. Chapman. On cross-examination the officer testified, relative to the conflict in her statements, that she denied she suffered from "blackouts."

Neither defendant appeared as a witness.

[1a] Mrs. Chapman's first contention, that she was denied her constitutional right to a speedy trial, is not borne out by the record. She voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2) and trial was set for February 5, 1963. On that date appointed counsel, the public defender, withdrew due to a conflict in interest in his representation of both her and the defendant Teale. New counsel appointed for Mrs. Chapman on February 5 instituted discovery proceedings and trial was postponed until March 19, presumably in the defendant's interest. (*People* v. *Donohoe,* 200 Cal.App.2d 17 [19 Cal.Rptr. 454].) Prior to the March 19 trial date Mrs. Chapman filed an affidavit that the public defender's prior representation of her would prejudice her right if a joint trial was had, and the court permitted the public defender to withdraw as counsel for Teale also. New counsel was appointed for Teale and trial was again postponed, to give such counsel an opportunity to prepare, until April 16, when trial was had.

[2] Where a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced. (*People* v. *McFarland,* 209 Cal.App.2d 772 [26 Cal.Rptr. 596]; *Ferenz* v. *Superior Court,* 53 Cal.App.2d 639 [128 P.2d 48].) [1b] Moreover,

assuming without concluding that there was an improper denial of a speedy trial, the error must be prejudicial to merit a reversal therefor. (*People* v. *Wilson,* 60 Cal.2d 139, 152 [32 Cal.Rptr. 44, 383 P.2d 452].) Although Mrs. Chapman asserts that the delay caused her an emotional upset which persuaded her not to testify in her own behalf she still fails to show how her testimony would have aided her cause.

Both defendants contend that the evidence is insufficient to justify the verdicts. The defendant Teale further contends that the evidence presented to the grand jury failed to establish reasonable or probable cause to hold him to answer for the crimes charged. Teale unsuccessfully moved in the trial court to set aside the indictment on grounds of insufficiency (see Pen. Code, § 995), and his petition for prohibition upon the ground that the indictment was found without reasonable or probable cause was denied by the District Court of Appeal (see Pen. Code, § 999a). [3a] The evidence before the grand jury was substantially the same as that herein recited other than that of the People's expert witness and the fellow prisoner to whom Teale made certain admissions. [4] We recently stated in *People* v. *Ketchel,* 59 Cal.2d 503 at page 532 [30 Cal.Rptr. 538, 381 P.2d 394]: "'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*People* v. *Nagle,* 25 Cal.2d 216, 222 [153 P.2d 344].) An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.' (*Bompensiero* v. *Superior Court* (1955) 44 Cal.2d 178, 183-184 [281 P.2d 250], emphasis added; see also *Weber* v. *Superior Court* (1950) 35 Cal.2d 68, 69 [216 P.2d 871].) [5] 'If there is some evidence to support the indictment, the courts will not inquire into its sufficiency. . . .' (*Lorenson* v. *Superior Court* (1950) 35 Cal.2d 49, 55 [216 P.2d 859]; *Greenberg* v. *Superior Court* (1942) 19 Cal.2d 319, 322 [121 P.2d 713].)"

[3b] Unquestionably the motion to set aside the indictment on grounds of a lack of reasonable or probable cause was properly denied. [6] Resolving as we must all intendments in favor of the findings of guilt, circumstantial as it may be, we cannot fairly conclude that there is a lack of substantial evidence as to either defendant or as to any count. (See *People* v. *Robillard,* 55 Cal.2d 88, 93 [10 Cal. Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Love,* 53 Cal.2d 843, 850-851 [3 Cal.Rptr. 665, 350 P.2d 705].)

Both defendants also contend that the court committed prejudicial error in instructing the jury on conspiracy when no conspiracy was charged in the indictments and the prosecution did not indicate that it would try the case as a conspiracy. It is true that there was no count in conspiracy but the court nevertheless fully instructed thereon, not only a first time as a part of its general instructions but also a second time upon request by the jury after it had initially retired. If the giving of such instructions constitutes error the prejudicial effect thereof is manifest where, as in the instant case, a determination as to which of two defendants might have delivered the fatal blow is a difficult one. Furthermore, as will be seen, the question of the admissibility of certain real evidence as to one or both of the defendants depends, in part at least, upon the presence or lack of a conspiracy and the propriety of taking it into consideration.

[7] It must be deemed to be established law that "a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one. (*People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [22] [20 Cal.Rptr. 165, 369 P.2d 714]; *People* v. *Davis* (1957) 48 Cal.2d 241, 250 [11] [309 P.2d 1]; *People* v. *Tanner* (1935) 3 Cal.2d 279, 299 [7] [44 P.2d 324]; *People* v. *Wells* (1960) 187 Cal.App.2d 324, 329-330 [12] [9 Cal.Rptr. 384].)" (*People* v. *Pike,* 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656].) [8] In the instant case there was evidence that the parties were together in Reno where Mrs. Chapman purchased two guns; that

thereafter they remained in each other's company until after the commission of the crimes charged; that immediately before appearing at the victim's bar they departed from another bar upon Mrs. Chapman's conclusion that they were not "going to do anything here"; that they were left in the bar alone with the victim; that they departed from the tavern with the victim under unusual circumstances; that the victim entered their automobile; that while in the automobile the victim was robbed and killed with a gun of the caliber purchased by defendants; that the defendants disposed of his body and went together to a motel. Based on the foregoing and other evidence the jury could reasonably have inferred the existence of a conspiracy between the defendants to commit the crimes with which they were charged (Pen. Code, § 31), and no error is apparent in the giving of an instruction on conspiracy.

[9] Objection is further made that the instruction, as submitted by the prosecution and given by the court made reference to the "alleged conspiracy" and the "alleged conspirators." Even if we assume such references were inaccurate it does not appear that any prejudice resulted therefrom. As concluded, the conspiracy, if the jury found it to be a fact, could have been considered in determining the substantive crimes whether or not a conspiracy was alleged, and defendants were found guilty only of the substantive crimes. Nor is there any merit to defendants' further implication that they were misled by the prosecution's strategy. The People indicated during the trial in open court but out of the presence of the jury that the consequences of the conspiracy would be placed in issue if the evidence justified it.

[10] It is next asserted on the part of the defendant Teale that certain evidence was improperly admitted over objection. He objected to the admission of the gun record in the pawnshop in Reno where Mrs. Chapman made purchases, the check of Mrs. Chapman found near the body, a blue dress with blood stains thereon and the registration card for the motel in Woodland, which she signed. The objection in each

instance is based on the claim that none of the exhibits were connected with Teale personally. However, once a conspiracy has been established, evidence of the acts and declarations of the alleged conspirators individually in furtherance of that conspiracy is admissible. (*People* v. *Calhoun*, 50 Cal.2d 137, 143 [323 P.2d 427]; *People* v. *Buckley*, 202 Cal.App.2d 142, 148 [20 Cal.Rptr. 659].)

[11] Teale further contends that because the court at first sustained his objection to the introduction of the registration card he was influenced to waive his right to cross-examine the authenticating witness and that the later admission of the card, in effect, deprived him of his right of cross-examination. While the contention has some basis in theory, Teale was not precluded from recalling the witness had he reason for doing so. In any event he fails to establish the nature of the testimony he might have elicited on cross-examination and in what manner he had been prejudiced by the claimed denial. The error, if any, manifestly was not prejudicial.

[12] Both defendants further contend that the dress referred to above was improperly admitted on the further ground that the People failed to establish a foundation as to the source of the dress. It was confiscated with other clothing in Mrs. Chapman's possession at the time of her arrest in St. Joseph. She admitted at that time that the dress was her property. The impropriety is claimed to exist, however, because the People failed to establish that the dress was in Mrs. Chapman's possession or in the automobile at the time of the homicide. It appears that two cartons of personal effects were shipped to St. Joseph prior to the homicide and the implication thus raised by the objection is that the People should have established, as part of the foundation, that the dress was not a part of that shipment.

The contention raised does not go to the question of whether the real evidence offered is in fact the identical property confiscated without alteration, or to the integrity

of the chain of possession between confiscation and admission into evidence. (See *People* v. *Riser*, 47 Cal.2d 566, 580 [305 P.2d 1]; *People* v. *Nakis*, 184 Cal. 105, 113-114 [193 P. 92]; *People* v. *Lugo*, 205 Cal.App.2d 772, 776 [21 Cal. Rptr. 871].) The significance of the blood stains on the dress was a matter which the jury had the right to consider and it was for the jury to determine as a question of fact from all the evidence whether the dress had been in the automobile at the time of the homicide. (*People* v. *Adamson*, 27 Cal.2d 478, 485 [165 P.2d 3].) The dress tended to throw light on an issue in dispute and the question thus was not its admissibility but rather the weight to be accorded to it. [13] Nor was it error, as further claimed by defendants, to exclude their offer of another dress which was claimed to have been worn by Mrs. Chapman on the evening and early morning of the 17th and 18th of October. The relevancy of the dress itself was not demonstrated, and defendants were in no manner foreclosed from disputing the significance of the blood spots on the dress which was put into evidence.

[14a] Defendants next complain that they were not permitted to place before the jury for its determination evidence that the prosecution had failed to comply with a discovery order. It was brought out on cross-examination of a number of the prosecution witnesses that they had been interrogated by police officers who made notes and records of the interview and, in some cases, tape recordings. Such original notes, records and recordings were covered by the discovery order but were not made available to defendants for the stated reason that after the officers' field notes had been transcribed into integrated reports the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

There is, in fact, no basis for a reasonable belief that the prosecution withheld any information in its possession or otherwise frustrated the defendants. There is no claim that particular *information*, as distinguished from the nature of the recording thereof, has been withheld. The trial court,

however, did not let the question of the prosecution's compliance with the discovery order to get before the jury, and advised counsel that the question of compliance was for the court on proper motion in proceedings which were independent of the trial of the causes. It further advised that the question of compliance with discovery was to be distinguished from the suppression or destruction of evidence, which latter matters were pertinent for the jury's consideration.

In this regard the court invited defense counsel to submit evidence of suppression, if any they had, and instructed the jury as follows: "If the People do not present evidence which is available to them which they would naturally be expected to bring before the court, and which is not available to the defendants, you may infer, if it seems reasonable to you to do so, that this evidence would have been unfavorable to the People.

"If you find that any investigating officers wilfully concealed or destroyed evidence in order to prevent its being brought before the court in this trial, you may presume that the evidence, if presented, would have been adverse to the People's case, and you may consider such conduct in determining the merits of their case.

"Note, I do not say that any investigating officers have wilfully concealed or destroyed evidence. This is a question which you must first determine before you may consider the presumption which I have referred to."

[15] The issue raised is a novel one, and we have concluded that the question of compliance with a discovery order is not a matter for the jury's consideration providing, of course, that the jury's right to determine matters bearing on the suppression of evidence is not restricted. [14b] As stated, the record presents no ground for a reasonable belief of misconduct on the part of the prosecution in the instant case. (See *People* v. *Kroeger*, 61 Cal.2d 236, 246-247 [37 Cal. Rptr. 593, 390 P.2d 369].)

The court did not give an instruction on second degree murder or manslaughter, and instructed that defendants were either not guilty of murder at all or were guilty of murder of the first degree. It must be presumed that defendants, if guilty of murder of the first degree, were guilty under the felony murder doctrine, as no instructions on premeditation and deliberation were given. (Pen. Code, § 189.) Thus, the jury was instructed, in effect, that if it found defendants committed the unlawful killing then it must further find that the killing occurred in the perpetration of a robbery. That a robbery had been committed is uncontroverted and appears as a matter of law.

The defendant Teale's only defense was a denial of the commission of the homicide. (See *People* v. *Turville*, 51 Cal. 2d 620, 633 [335 P.2d 678]; *People* v. *Imbler*, 57 Cal.2d 711, 715 [21 Cal.Rptr. 568, 371 P.2d 304].) Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a "disassociative reaction"; that when she found herself in an uncontrollable situation she would " 'black out' by simply not knowing."

[16] Defendants, who did not request an instruction on second degree murder or manslaughter, now complain that the court should have given such instructions on its own motion, and that the same were required on the theory that the homicide occurred in the perpetration of a felony other than one of those mentioned in section 189 of the Penal Code, that is, simple kidnaping. Thus, it is claimed, that since the jury found a simple kidnaping as well as the robbery had occurred such additional criminal act made it incumbent upon the court to instruct on second degree murder.

The foregoing contention is obviously without merit. Where, as here, the evidence compels a conclusion that a murder, if committed at all, was committed in the perpetration of a robbery and for that reason is murder of the first degree, it does not follow that if it further appears that such

murder was committed in the perpetration of robbery *and* simple kidnaping it now becomes murder of the second degree. The fact that a second, lesser homicide has *also* been committed does not require instructions thereon where, conceding the homicide, the greater offense appears as a matter of law. The only real question before the jury was thus whether defendants were the perpetrators of the homicide.

[17] It is contended that, at least as to Mrs. Chapman, her crime might have been manslaughter because she could not have entertained the specific intent to murder, but might have entertained the lesser intents associated with involuntary manslaughter. (See *People* v. *Modesto,* 59 Cal.2d 722 [31 Cal.Rptr. 225, 382 P.2d 33].) But an objective evaluation of the defendant's evidence as to her mental capacity does not permit a reasonable conclusion that she could not have acted with "malice aforethought" (Pen. Code, § 187), and at the same time have entertained an intent to commit an "unlawful act, not amounting to a felony" or a lawful act "in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192.) According to her expert witness' testimony she did not have the mental capacity to commit any crime. Hence, the jury was properly instructed that defendants were guilty of murder of the first degree or were not guilty of the unlawful commission of any homicide.

[18] Error is claimed by Mrs. Chapman in instructions given on the effect which intoxication of an accused may bear on the question of specific intent where such intent is an element of the crime charged.[1] The challenged instruc-

[1] The portion of the instructions objected to were as follows: "Our law provides that no act committed by persons while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition. This means that such a condition, if shown by the evidence to have existed in the defendants at the time when allegedly they committed the crimes charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct."

tions are similar to those condemned in *People* v. *Spencer*, 60 Cal.2d 64, 86-87 [31 Cal.Rptr. 782, 383 P.2d 134]. Although further instructions which immediately followed properly stated the law, and, as in *Spencer*, "it appears that upon rather elaborate analysis a correct understanding of the relevant law can be gleaned from the instructions construed as a whole," nevertheless it was error to burden the jury with the confusing and contradicting instructions in such circumstances. However, for the reasons which follow, the error was harmless.

As in *Spencer*, the evidence of the defendant's intoxication was minimal and for that reason the erroneous instruction must be deemed nonprejudicial. (*People* v. *Spencer, supra*, 60 Cal.2d 64, 87.) Moreover, the defendant did not rely on intoxication in the ordinary sense. Her defense was that due to her emotional instability, coupled with the presence of alcohol in her system, she "blacked out", and suffered a complete mental disassociation. This theory was fully exploited by the defendant and in such circumstances the instant error on the effect of intoxication on ability to form a specific intent was not prejudicial.

[19] Defendant Chapman next claims that an instruction relating to confessions and admissions was not applicable to her, as she personally had made no such statements, and that it was prejudicial error to not so instruct the jury. In *People* v. *Burns*, 114 Cal.App.2d 566 [250 P.2d 619], it was held to be reversible error as to a nonconfessing defendant to fail to limit an instruction on confessions to his confessing codefendant. (See also, *People* v. *Wade*, 185 Cal.App.2d 226 [8 Cal.Rptr. 197].)

While it is true that the instruction on confessions and admissions was couched in general terms and, standing alone, would reasonably be construed to apply to Mrs. Chapman as well as Mr. Teale, it further appears that other instructions negated the error, if any, in the circumstances here prevailing. Moreover there was evidence of statements made by Mrs. Chapman, probably not amounting to admis-

sions, which were testified to during the trial. Mrs. Chapman also made several statements which constituted admissions but which were not put into evidence. Nevertheless, constant references were made to such statements by the various psychiatrists who testified, and defense counsel argued vigorously for the admission of an exhibit consisting of an 84-page statement by Mrs. Chapman. In each instance where a statement by Mrs. Chapman was referred to by a psychiatrist witness, the jury was admonished that the statement was not to be received as proof of the matters asserted, but only as going to the basis upon which the doctor had formulated his opinions. In addition the court instructed the jury at the close of the trial as follows: "During the course of this trial, psychiatrists have testified concerning the mental and emotional condition of defendant Ruth Chapman. During their testimony they related certain statements made by Mrs. Chapman to them. These statements were not evidence of the facts related, but were admissible only as they explained or formed a basis for the expert opinion of the psychiatrists concerning the mental and emotional condition of defendant Ruth Chapman."

It must be deemed, in view of the foregoing, that the jury was not misled as to those statements of Mrs. Chapman not received in evidence. As to extrajudicial statements which were received in evidence, the court instructed as follows immediately preceding the general instructions on confessions and admissions: "Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against the other defendant.

"In the trial of this case, there were instances when certain evidence was admitted as against one of the defendants, but denied admission as against the other.

"Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind

the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or against any one defendant to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that defendant, and you must try conscientiously to so treat such a situation.

"Where evidence has been received of a statement of a defendant after his or her arrest and in the absence of his codefendant, such statements can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against the codefendant.

"If in this trial any evidence has been received of a statement or admission of Thomas Leroy Teale after his arrest and in the absence of his codefendant, such statement can be considered only as evidence against Mr. Teale and cannot be considered for any purpose as evidence against Ruth Elizabeth Chapman.

"Likewise any evidence of a statement or admission of Ruth Elizabeth Chapman after her arrest and in the absence of her codefendant can be considered only as evidence against Mrs. Chapman and cannot be considered for any purpose as evidence against Thomas Leroy Teale."

In view of the foregoing specific instructions immediately preceding the general instructions on admissions and confessions we are persuaded to the conclusion that the jury reasonably could not have applied either Mrs. Chapman's excluded extrajudicial statements or the admissions which the defendant Teale made to his fellow inmate in determining the individual guilt of Mrs. Chapman.

No contention is made that any of the extrajudicial statements were received in evidence in violation of defendants' right to counsel as enunciated in *Escobedo* v. *Illinois*, 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], *Massiah* v. *United States*, 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], and

People v. *Dorado*, [a]62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361], and it otherwise does not appear that defendants' rights in this regard have been infringed. In any event, aside from Teale's statement to his fellow inmate, which clearly falls outside the proscription of *Escobedo*, *Massiah* and *Dorado*, the admission of other statements could not have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 4½.)

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. This failure to testify was not commented upon by the prosecuting attorney, but the court, in instructions to the jury and in accordance with the California constitutional provision (Cal. Const., art. I, § 13) stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comment has been ruled in violation of the Fifth and Fourteenth Amendments. (*Griffin* v. *California*, —— U.S. —— [85 S.Ct. ——, 14 L.Ed.2d 106]; *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in making such comment has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick*, [b]62 Cal.2d ——, ——, —— [44 Cal.Rptr. 649, 402 P.2d 529].)

It clearly appears that the error in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when con-

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[a] Advance Report Citation: 62 A.C. 350.

[b] Advance Report Citation: 62 A.C. 869, 872-876.

sidered with the other substantial evidence, the fact of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comment on her failure to explain away the circumstantial web of evidence, becomes of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the comment adds little to its stature. Moreover, we are unable to discern what bearing, if any, the comment would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the rather innocuous instruction added little which was not already apparent to the jurors, that is, the defendants were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comment a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

We further conclude that numerous other contentions of procedural errors, generally dealing with the court's ruling on evidentiary matters, to be lacking in merit either for the reason that the ruling was not in error or that the matter was so trivial as to be nonprejudicial.

[21] Contention is also made by the defendant Teale that prejudicial error occurred in the penalty phase in the court's

instructions, and the prosecutor's arguments going to the role played by the Adult Authority in fixing parole for those convicts sentenced to life terms. (*People* v. *Morse*, 60 Cal. 2d 631 [36 Cal.Rptr. 201, 388 P.2d 33].) However, the instructions and arguments fall far short of those condemned in *Morse*.

The instruction to which exception is taken is as follows: "Further the law of this state provides that every person guilty of murder of the first degree shall suffer death or confinement in the state prison for life with the possibility of parole." And the language of the prosecutor to which particular objection is taken is as follows: "For example, if you feel that a term in prison, for example —, with all of the facilities for rehabilitation and so forth, would insure, insofar as human reason can infer, that these defendants, even if they are ultimately and they will be one day perhaps—there is a possibility if they are—the death penalty is not invoked, possibly they may be paroled.—They may not be, but again they may be. It is the law."

The jury was not advised of the role which the Adult Authority plays, the conditions under which parole is granted, statistical information relative to past and current practices in granting parole, or any of the other matters condemned in *Morse* as improper for the jury to consider. Insofar as appears the jury was advised only that a convict undergoing a life sentence might someday be paroled and the further obvious inference might be drawn from the prosecutor's remarks that if the death penalty is invoked there is no possibility of parole. Manifestly, the invitation to the jury to speculate and surmise as to the improper release of a defendant to society in the future if a life instead of a death sentence is imposed, upon which *Morse* turned, is completely lacking in the instant case.

[22] As the evidence clearly indicates that all of the crimes charged and of which Mrs. Chapman stands convicted are inseparable, she was improperly sentenced for all three counts. (*People* v. *McFarland*, 58 Cal.2d 748 [26 Cal.Rptr.

473, 376 P.2d 449]; *People* v. *Houston*, 219 Cal.App.2d 187 [33 Cal.Rptr. 26].) Thus the judgment, insofar as it imposes punishment for robbery and kidnaping, the lesser crimes, must be reversed as to Mrs. Chapman. As the death penalty was imposed on the defendant Teale he is not affected by multiple sentencing. (*People* v. *Seiterle*, 59 Cal. 2d 703, 712 [31 Cal.Rptr. 67, 381 P.2d 947].)

The judgment is reversed insofar as it imposes sentences for robbery and kidnaping on Mrs. Chapman, and in all other respects is affirmed. The judgment as to the defendant Teale is affirmed in all respects.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Schauer, J.,* and Dooling, J.,* concurred.

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* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

Opinion of Supreme Court of California Modifying Original Decision

[63 A.C. No. 8, page 269]

[Crim. No. 7577. In Bank. Aug. 27, 1965.]

THE PEOPLE, *Plaintiff and Respondent,* v. THOMAS LEROY TEALE and RUTH ELIZABETH CHAPMAN, *Defendants and Appellants.*

[Modification* of opinion (63 A.C. 175, —— Cal.Rptr. ——).]

[20] *Id.—Appeal—Harmless Error—Misconduct of Prosecutor—Comment on Defendants' Failure to Testify: Instructions.*—Though the prosecutor, in his final argument, erroneously commented on, and the court, in an instruction, erroneously made statements concerning, codefendants' failure to testify, the errors did not result in a miscarriage of justice where the evidence of one defendant's guilt was overwhelming, and the comments and instruction added little to the unchallenged, persuasive and circumstantial web of evidence against the other defendant and had no bearing on her defense of inability to form the requisite intent.

THE COURT.—The opinion herein, appearing in 63 A.C. 175, is modified by striking four paragraphs, beginning with the words "As stated" at the bottom of page 192, and ending with the end of the second paragraph on page 194, and substituting in lieu thereof the following:

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury,

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McK. Dig. References: [20] Criminal Law, §§ 1404(17), 1435.

*This modification requires deletion of old headnote [20] and substitution of new headnote [20].

commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provision (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteen Amendments (*Griffin* v. *California,* 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], *Malloy* v. *Hogan,* 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed. 2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick,* [a]62 Cal.2d 820, 823-827 [44 Cal. Rptr. 649, 402 P.2d 529].)

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[a] Advance Report Citation: 62 A.C. 869, 872-876.

It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instructions on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comments and instructions a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

APPENDIX C

Opinion of Supreme Court of California, as Modified

[63 Cal.2d 178]

[Crim. No. 7577. In Bank. July 16, 1965.]

THE PEOPLE, *Plaintiff and Respondent*, v. THOMAS LEROY TEALE and RUTH ELIZABETH CHAPMAN, *Defendants and Appellants*.

[1a, 1b] *Criminal Law—Time of Trial—Right to Speedy Trial.*—Defendant was not denied her constitutional right to a speedy trial where she voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2), and the trial date was postponed to permit substitution of counsel to prevent a conflict of interests; the delay, if error, was not prejudicial though defendant asserted it caused her emotional upset that persuaded her not to testify, where she failed to show how her testimony would have aided her cause.

[2] *Id.—Time of Trial—Continuances.*—A continuance granted on good cause to a codefendant is generally deemed not to prejudice other defendants.

[3a, 3b] *Indictment and Information—Defects—Motion to Set Aside—Insufficiency of Evidence.*—A motion to set aside an indictment for kidnaping, robbery and

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[1] See *Cal.Jur.2d*, Criminal Law, § 125 et seq.; *Am.Jur.2d*, Criminal Law, § 241 et seq.

McK. Dig. References: [1] Criminal Law, § 238; [2] Criminal Law, § 250; [3, 5] Indictment and Information, § 88(7); [4] Indictment and Information, § 88(7); Prohibition, § 43; [6] Homicide, § 145(1); [7] Conspiracy, § 18; [8] Conspiracy, § 25(1); [9] Conspiracy, § 25(13); [10] Conspiracy, § 20(1); [11] Criminal Law, § 1382(22) [12, 13] Homicide, § 120; [14] Criminal Law, § 104.5; [15] Criminal Law, § 635; [16] Homicide, § 188; [17] Homicide, § 185; [18] Criminal Law, § 1421; [19] Criminal Law, § 1434; [20] Criminal Law, §§ 1404(17), 1435; [21] Criminal Law, § 1011.1; [22] Criminal Law, § 1475.

murder for lack of reasonable or probable cause was properly denied where it was shown that persons resembling defendants were observed with the victim shortly before the murder, that the bar the victim tended was robbed, that the victim's body was found in a ditch, and that the bullet wounds in the victim's head were inflicted by the caliber of gun purchased by one defendant.

[4] *Id.—Defects—Motion to Set Aside: Prohibition—Criminal Proceedings.*—Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of an accused's guilt, and an indictment will not be set aside or prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.

[5] *Id.—Defects—Motion to Set Aside—Insufficiency of Evidence.*—If there is some evidence to support an indictment, courts will not inquire into its sufficiency.

[6] *Homicide — Evidence — Circumstantial Evidence.*—Though circumstantial, evidence of first degree murder was substantial where it was shown that persons resembling defendants were seen with the victim on the night of the murder, that the bar tended by the victim was robbed, that the victim's body was found in an open ditch with bullet wounds in the head made by a gun of a caliber purchased by one defendant, that blood of the victim's type was in defendants' car and on their clothes and fibers from the victim's shoes matched those found in the car, that hairs matching the victim's were found in the car, that red paint on the car's floor mat came from the victim's shoes, and that one defendant told a fellow prisoner that the other defendant committed the murder.

[7] *Conspiracy—Criminal—Indictment and Information —Proof and Variance.*—A conspiracy need not be pleaded in an indictment or information where the evidence actually shows the existence of conspiracy.

[8] *Id.—Criminal—Instructions.*—To instruct on conspiracy was not error, though conspiracy was not charged, where there was evidence that defendants, who purchased guns before a murder, stayed together until after the murder, that they were with the victim, and that the victim was killed with the same caliber of gun as one they purchased.

[9] *Id.—Criminal—Instructions.*—In a prosecution for murder, kidnaping and robbery, assuming that references in instructions to the "alleged conspiracy" and the "alleged conspirators" were inaccurate, no prejudice resulted where the jury could consider the conspiracy, if it found it to be a fact, in determining the substantive crimes, regardless of whether a conspiracy was alleged, and defendants were found guilty only of the substantive crimes.

[10] *Id.—Criminal—Evidence—Acts of Coconspirators.*—In a prosecution of codefendants for murder, once a conspiracy was established between them, evidence of the purchase of a gun by one defendant, of a check with her name near the victim's body, her dress with bloodstains, and a registration card signed by her for a motel near the murder scene were admissible, though not personally connected with her codefendant.

[11] *Criminal Law — Appeal — Harmless Error — Evidence.*—Any error in admitting documentary evidence after it was first refused and defendant waived his right to cross-examine the authenticating witness was not prejudicial where defendant was not precluded from recalling the witness and failed to estab-

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[7] See *Cal.Jur.2d,* Conspiracy, § 20 et seq.; *Am.Jur.2d,* Conspiracy, § 20 et seq.

lish the nature of the testimony he might have elicited on cross-examination and in what manner he was prejudiced by the claimed denial.

[12] *Homicide—Evidence—Demonstrative Evidence.*—In a murder case, a defendant's dress stained with blood of the victim's type tended to throw light on an issue in dispute and the jury had a right to determine whether the dress was in defendant's car at the time of the homicide.

[13] *Id.—Evidence—Demonstrative Evidence.*—In a murder case in which the People introduced one defendant's dress stained with blood of the victim's type, it was not error to exclude defendants' offer of another dress that was claimed to have been worn by defendant about the time the murder took place where the relevancy of the dress was not demonstrated and defendants were not foreclosed from disputing the significance of the blood spots on the dress put in evidence.

[14a, 14b] *Criminal Law—Rights of Accused—Rights of Discovery and Inspection.*—The prosecutor was not guilty of misconduct in failing to comply with a discovery order for inspection of notes and records of interviews by the police with prosecution witnesses where they were not made available to defendants for the stated reason that after officers' field notes were transcribed into integrated reports, the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

[15] *Id.—Province of Court and Jury—Compliance With Discovery Orders.*—The compliance or failure to comply with a discovery order is not a matter for the jury's consideration, providing its right to determine matters bearing on the suppression of evidence is not restricted.

[16] *Homicide—Instructions—Killing in Perpetration of Certain Felonies.*—Where a murder, if committed at all, was committed in the perpetration of a robbery as a matter of law and for that reason is murder in the first degree, and it further appears that such murder was committed in the perpetration of robbery *and* simple kidnaping, the fact that a second, lesser homicide was also committed did not require the court to instruct on its own motion on second degree murder.

[17] *Id.—Instructions—Murder.*—Where there was expert testimony that defendant did not have the mental capacity to commit any crime and evidence that defendant killed the victim in the perpetration of a robbery, the jury was properly instructed that defendant was guilty of first degree murder or not guilty.

[18] *Criminal Law—Appeal—Harmless Error—Instructions.*—In a prosecution for a murder committed in the perpetration of robbery, though it was error to give confusing and contradictory instructions on the effect that defendant's intoxication might bear on specific intent, the instruction was nonprejudicial where the evidence of defendant's intoxication was minimal.

[19] *Id.—Appeal—Harmless Error—Instructions.*—In a prosecution of codefendants, though an instruction on admissions and confessions applied only to one defendant, any error in couching the instruction in general terms so that it could reasonably be construed to apply to both defendants was negated where the defendant to whom it did not apply had made admissions, not put in evidence, to psychiatrists who testified and referred to such admissions, but the

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[16] See *Cal.Jur.2d*, Homicide, § 77; *Am.Jur.*, Homicide (1st ed. § 64).

jury was admonished at the time and at the close of trial to consider the admissions only as going to the basis of the doctors' opinions.

[20] *Id. — Appeal — Harmless Error — Misconduct of Prosecutor—Comment on Defendants' Failure to Testify: Instructions.*—Though the prosecutor, in his final argument, erroneously commented on, and the court, in an instruction, erroneously made statements concerning, codefendants' failure to testify, the errors did not result in a miscarriage of justice where the evidence of one defendant's guilt was overwhelming, and the comments and instruction added little to the unchallenged persuasive and circumstantial web of evidence against the other defendant and had no bearing on her defense of inability to form the requisite intent.

[21] *Id.—Proceeding for Determining Penalty.*—In discussing life imprisonment and the death penalty on the penalty phase of a first degree murder case, the prosecutor's advice that only a convict undergoing a life sentence might someday be paroled, from which the obvious inference could be drawn that there was no possibility of parole should the death penalty be invoked, fell far short of the prejudicial error in inviting the jury to speculate and surmise on the improper future release of a defendant should a life sentence be imposed.

[22] *Id.—Double Punishment.*—Where the evidence indicated that defendant's crimes of murder, robbery and kidnaping were inseparable, defendant was improperly sentenced on all three counts and the judgment, imposing punishment for robbery and kidnaping, must be reversed.

APPEALS (one automatically taken under Pen. Code, § 1239, subd. (b)) from a judgment of the Superior Court of San Joaquin County. William Biddick, Jr., Judge. Judgment

affirmed in part and reversed in part as to one defendant and affirmed as to the other defendant; purported appeal from order denying new trial dismissed.

Prosecution for murder, robbery and kidnaping. As to defendant on automatic appeal, judgment of conviction affirmed in all respects; as to other defendant, judgment of conviction of first degree murder, first degree robbery and simple kidnaping reversed insofar as it imposed sentences for robbery and kidnaping and affirmed in all other respects.

Nels B. Fransen, Thomas R. Krehbiel and Richard E. Johnson, under appointment by the Supreme Court, and Simonelli & Fransen for Defendants and Appellants.

Stanley Mosk and Thomas C. Lynch, Attorneys General, Doris H. Maier, Assistant Attorney General, and Raymond M. Momboisse, Deputy Attorney General, for Plaintiff and Respondent.

PEEK, J.—Defendants Thomas L. Teale and Ruth Elizabeth Chapman were convicted by a jury of the first degree murder of Billy Dean Adcock, robbery of the first degree and simple kidnaping. A life sentence was imposed upon the defendant Chapman as to the murder count and she appeals from the whole of the judgment. The death penalty was imposed upon the defendant Teale, and his appeal is automatic pursuant to the provisions of section 1239, subdivision (b) of the Penal Code. The order denying defendants' motion for a new trial being nonappealable, the defendant Chapman's purported appeal therefrom must be dismissed. (Pen. Code, § 1237.)

On October 17, 1962, defendants registered at a motel in Fresno, where they gave a bad check in payment of their room rental. At approximately 10 p.m. on that same day they entered a tavern near Lodi where they remained for nearly three hours and together consumed five bottles of beer. Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here," or "We can't do anything here, let's go." They then left the tavern together.

Defendants next appeared at about 2 a.m. the following day at the "Spot Club" in Lodi. The only persons in the bar at that time were the defendants and Adcock, the bartender. Shortly thereafter three persons, including the bartender and a woman of Mrs. Chapman's general description, were observed in front of the Spot Club. The third person in the group, a man resembling the defendant Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern.

The following morning the owner of the bar found it to be in unusual disarray. The cash register had been broken into and approximately $260 was missing. Papers usually kept in the register were scattered about the floor. Routine housekeeping tasks which the bartender generally completed before leaving had not been performed.

Later that morning the victim's body was found in a remote area north of Lodi. It was half submerged in an open ditch by the side of a road. The clothing was torn and there was blood on the face and on the surface of the road nearby. The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches. The third bullet entered the back of the head from a gun held some 18 inches away. The time of death from the gunshot wounds was estimated at 3 on the morning of the 18th.

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the defendant Chapman in Reno, Nevada, while there with Teale six days before the killing. Neither the gun which she purchased, nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been removed, and a check for $2.00 bearing a stamp "Refer to Maker," which had been signed by Mrs. Chapman.

Evidence connecting defendants with the commission of the crime was submitted by an expert witness for the People

who testified that the victim's blood was Type A; that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of defendants' vehicle; that blood had spattered or radiated out from the right front side of the automobile; that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession; that Type A blood was also found on defendant Teale's shirt and jacket; that numerous fibers taken from the victim's shoes matched those found in the defendants' automobile, that hairs were found in the automobile which matched those of the victim; that red paint found on the floor mat of the defendants' automobile came from the shoes of the victim, and that in the opinion of the expert the victim had been in the defendants' automobile.

Defendant Teale was arrested in New Orleans on November 2, 1962. At that time he carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she purchased the .22 caliber weapon hereinbefore mentioned, and he was driving the automobile which had been in the defendants' possession before and at the time of the killing.

After his return to California Teale was confined with one Waldo Vowel, another prisoner, who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet." Later, the witness testified, he had another conversation with Teale in the prison yard: "I told him I knew Bill [the deceased], and he [Teale] told me he didn't plan for it to happen that way, and he started relating to me how it happened. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him. But he said when they pulled up and stopped, that he opened the door, he didn't say who was driving or

nothing, just said when they stopped that he got out to go around—go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times."

Teale further stated, according to the witness, that "they" would never find the gun. In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years." The foregoing testimony of conversations had with Teale was received under an admonition that the jurors could consider it only as to Teale. No claim is made and the record does not disclose that Teale's fellow prisoner was acting in complicity with the state.

Mrs. Chapman was arrested by an agent of the Federal Bureau of Investigation in St. Joseph, Missouri, on October 26, 1962, and thereafter gave conflicting accounts to the officer of her whereabouts on October 17 and 18. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph. She later stated that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco. However it was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland at 4:40 a.m. on October 18, was made out in her handwriting. The clerk of the motel also testified that the registrant gave a false license number, and that the automobile in which the parties arrived was the one found in Teale's possession upon his arrest.

The record is mute as to the factual basis for certain of the requirements which must be satisfied before testimony

of Mrs. Chapman's statements could have been properly introduced by the prosecution. However, the conflicting testimony relative to her whereabouts on October 17 and 18 was elicited on direct examination from the federal agent appearing as a witness for Mrs. Chapman. On cross-examination the officer testified, relative to the conflict in her statements, that she denied she suffered from "blackouts."

Neither defendant appeared as a witness.

[1a] Mrs. Chapman's first contention, that she was denied her constitutional right to a speedy trial, is not borne out by the record. She voluntarily waived the 60-day limit (Pen. Code, § 1382, subd. 2) and trial was set for February 5, 1963. On that date appointed counsel, the public defender, withdrew due to a conflict in interest in his representation of both her and the defendant Teale. New counsel appointed for Mrs. Chapman on February 5 instituted discovery proceedings and trial was postponed until March 19, presumably in the defendant's interest. (*People* v. *Donohoe,* 200 Cal.App.2d 17 [19 Cal.Rptr. 454].) Prior to the March 19 trial date Mrs. Chapman filed an affidavit that the public defender's prior representation of her would prejudice her right if a joint trial was had, and the court permitted the public defender to withdraw as counsel for Teale also. New counsel was appointed for Teale and trial was again postponed, to give such counsel an opportunity to prepare, until April 16, when trial was had.

[2] Where a continuance is granted upon good cause to a codefendant the rights of the other defendants are generally not deemed to have been prejudiced. (*People* v. *McFarland,* 209 Cal.App.2d 772 [26 Cal.Rptr. 596]; *Ferenz* v. *Superior Court,* 53 Cal.App.2d 639 [128 P.2d 48].) [1b] Moreover, assuming without concluding that there was an improper denial of a speedy trial, the error must be prejudicial to merit a reversal therefor. (*People* v. *Wilson,* 60 Cal.2d 139, 152 [32 Cal.Rptr. 44, 383 P.2d 452].) Although Mrs. Chapman asserts that the delay caused her an emotional upset which

persuaded her not to testify in her own behalf she still fails to show how her testimony would have aided her cause.

Both defendants contend that the evidence is insufficient to justify the verdicts. The defendant Teale further contends that the evidence presented to the grand jury failed to establish reasonable or probable cause to hold him to answer for the crimes charged. Teale unsuccessfully moved in the trial court to set aside the indictment on grounds of insufficiency (see Pen. Code, § 995), and his petition for prohibition upon the ground that the indictment was found without reasonable or probable cause was denied by the District Court of Appeal (see Pen. Code, § 999a). [3a] The evidence before the grand jury was substantially the same as that herein recited other than that of the People's expert witness and the fellow prisoner to whom Teale made certain admissions. [4] We recently stated in *People* v. *Ketchel,* 59 Cal.2d 503 at page 532 [30 Cal.Rptr. 538, 381 P.2d 394]: " 'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused. (*People* v. *Nagle,* 25 Cal.2d 216, 222 [153 P.2d 344].) An indictment will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the *possibility* that an offense has been committed and the accused is guilty of it.' (*Bompensiero* v. *Superior Court* (1955) 44 Cal.2d 178, 183-184 [281 P.2d 250], emphasis added; see also *Weber* v. *Superior Court* (1950) 35 Cal.2d 68, 69 [216 P.2d 871].) [5] 'If there is some evidence to support the indictment, the courts will not inquire into its sufficiency. . . .' (*Lorenson* v. *Superior Court* (1950) 35 Cal.2d 49, 55 [216 P.2d 859]; *Greenberg* v. *Superior Court* (1942) 19 Cal.2d 319, 322 [121 P.2d 713].)"

[3b] Unquestionably the motion to set aside the indictment on grounds of a lack of reasonable or probable cause was properly denied. [6] Resolving as we must all intendments in favor of the findings of guilt, circumstantial as it may be, we cannot fairly conclude that there is a lack of

substantial evidence as to either defendant or as to any count. (See *People* v. *Robillard,* 55 Cal.2d 88, 93 [10 Cal. Rptr. 167, 358 P.2d 295, 83 A.L.R.2d 1086]; *People* v. *Love,* 53 Cal.2d 843, 850-851 [3 Cal.Rptr. 665, 350 P.2d 705].)

Both defendants also contend that the court committed prejudicial error in instructing the jury on conspiracy when no conspiracy was charged in the indictments and the prosecution did not indicate that it would try the case as a conspiracy. It is true that there was no count in conspiracy but the court nevertheless fully instructed thereon, not only a first time as a part of its general instructions but also a second time upon request by the jury after it had initially retired. If the giving of such instructions constitutes error the prejudicial effect thereof is manifest where, as in the instant case, a determination as to which of two defendants might have delivered the fatal blow is a difficult one. Furthermore, as will be seen, the question of the admissibility of certain real evidence as to one or both of the defendants depends, in part at least, upon the presence or lack of a conspiracy and the propriety of taking it into consideration.

[7] It must be deemed to be established law that "a conspiracy need not be pleaded in the indictment or information if the evidence actually shows the existence of one. (*People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [22] [20 Cal.Rptr. 165, 369 P.2d 714]; *People* v. *Davis* (1957) 48 Cal.2d 241, 250 [11] [309 P.2d 1]; *People* v. *Tanner* (1935) 3 Cal.2d 279, 299 [7] [44 P.2d 324]; *People* v. *Wells* (1960) 187 Cal.App.2d 324, 329-330 [12] [9 Cal.Rptr. 384].)" (*People* v. *Pike,* 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656].) [8] In the instant case there was evidence that the parties were together in Reno where Mrs. Chapman purchased two guns; that thereafter they remained in each other's company until after the commission of the crimes charged; that immediately before appearing at the victim's bar they departed from another bar upon Mrs. Chapman's conclusion that they were not "going to do anything here"; that they were left in the bar alone with the victim; that they departed from the tav-

ern with the victim under unusual circumstances; that the victim entered their automobile; that while in the automobile the victim was robbed and killed with a gun of the caliber purchased by defendants; that the defendants disposed of his body and went together to a motel. Based on the foregoing and other evidence the jury could reasonably have inferred the existence of a conspiracy between the defendants to commit the crimes with which they were charged (Pen. Code, § 31), and no error is apparent in the giving of an instruction on conspiracy.

[9] Objection is further made that the instruction, as submitted by the prosecution and given by the court made references to the "alleged conspiracy" and the "alleged conspirators." Even if we assume such references were inaccurate it does not appear that any prejudice resulted therefrom. As concluded, the conspiracy, if the jury found it to be a fact, could have been considered in determining the substantive crimes whether or not a conspiracy was alleged, and defendants were found guilty only of the substantive crimes. Nor is there any merit to defendants' further implication that they were misled by the prosecution's strategy. The People indicated during the trial in open court but out of the presence of the jury that the consequences of the conspiracy would be placed in issue if the evidence justified it.

[10] It is next asserted on the part of the defendant Teale that certain evidence was improperly admitted over objection. He objected to the admission of the gun record in the pawnshop in Reno where Mrs. Chapman made purchases, the check of Mrs. Chapman found near the body, a blue dress with blood stains thereon and the registration card for the motel in Woodland, which she signed. The objection in each instance is based on the claim that none of the exhibits were connected with Teale personally. However, once a conspiracy has been established, evidence of the acts and declarations of the alleged conspirators individually

in furtherance of that conspiracy is admissible. (*People* v. *Calhoun*, 50 Cal.2d 137, 143 [323 P.2d 427]; *People* v. *Buckley*, 202 Cal.App.2d 142, 148 [20 Cal.Rptr. 659].)

[11] Teale further contends that because the court at first sustained his objection to the introduction of the registration card he was influenced to waive his right to cross-examine the authenticating witness and that the later admission of the card, in effect, deprived him of his right of cross-examination. While the contention has some basis in theory, Teale was not precluded from recalling the witness had he reason for doing so. In any event he fails to establish the nature of the testimony he might have elicited on cross-examination and in what manner he had been prejudiced by the claimed denial. The error, if any, manifestly was not prejudicial.

[12] Both defendants further contend that the dress referred to above was improperly admitted on the further ground that the People failed to establish a foundation as to the source of the dress. It was confiscated with other clothing in Mrs. Chapman's possession at the time of her arrest in St. Joseph. She admitted at that time that the dress was her property. The impropriety is claimed to exist, however, because the People failed to establish that the dress was in Mrs. Chapman's possession or in the automobile at the time of the homicide. It appears that two cartons of personal effects were shipped to St. Joseph prior to the homicide and the implication thus raised by the objection is that the People should have established, as part of the foundation, that the dress was not a part of that shipment.

The contention raised does not go to the question of whether the real evidence offered is in fact the identical property confiscated without alteration, or to the integrity of the chain of possession between confiscation and admission into evidence. (See *People* v. *Riser*, 47 Cal.2d 566, 580 [305 P.2d 1]; *People* v. *Nakis*, 184 Cal. 105, 113-114 [193 P. 92]; *People* v. *Lugo*, 203 Cal.App.2d 772, 776 [21 Cal.Rptr.

871].) The significance of the blood stains on the dress was a matter which the jury had the right to consider and it was for the jury to determine as a question of fact from all the evidence whether the dress had been in the automobile at the time of the homicide. (*People* v. *Adamson*, 27 Cal.2d 478, 485 [165 P.2d 3].) The dress tended to throw light on an issue in dispute and the question thus was not its admissibility but rather the weight to be accorded to it. [13] Nor was it error, as further claimed by defendants, to exclude their offer of another dress which was claimed to have been worn by Mrs. Chapman on the evening and early morning of the 17th and 18th of October. The relevancy of the dress itself was not demonstrated, and defendants were in no manner foreclosed from disputing the significance of the blood spots on the dress which was put into evidence.

[14a] Defendants next complain that they were not permitted to place before the jury for its determination evidence that the prosecution had failed to comply with a discovery order. It was brought out on cross-examination of a number of the prosecution witnesses that they had been interrogated by police officers who made notes and records of the interview and, in some cases, tape recordings. Such original notes, records and recordings were covered by the discovery order but were not made available to defendants for the stated reason that after the officers' field notes had been transcribed into integrated reports the original notes and records were discarded and tapes erased, in accordance with routine practices of the department.

There is, in fact, no basis for a reasonable belief that the prosecution withheld any information in its possession or otherwise frustrated the defendants. There is no claim that particular *information*, as distinguished from the nature of the recording thereof, has been withheld. The trial court, however, did not let the question of the prosecution's compliance with the discovery order get before the jury, and advised counsel that the question of compliance was for the court on proper motion in proceedings which were inde-

pendent of the trial of the causes. It further advised that the question of compliance with discovery was to be distinguished from the suppression or destruction of evidence, which latter matters were pertinent for the jury's consideration.

In this regard the court invited defense counsel to submit evidence of suppression, if any they had, and instructed the jury as follows: "If the People do not present evidence which is available to them which they would naturally be expected to bring before the court, and which is not available to the defendants, you may infer, if it seems reasonable to you to do so, that this evidence would have been unfavorable to the People.

"If you find that any investigating officers wilfully concealed or destroyed evidence in order to prevent its being brought before the court in this trial, you may presume that the evidence, if presented, would have been adverse to the People's case, and you may consider such conduct in determining the merits of their case.

"Note, I do not say that any investigating officers have wilfully concealed or destroyed evidence. This is a question which you must first determine before you may consider the presumption which I have referred to."

[15] The issue raised is a novel one, and we have concluded that the question of compliance with a discovery order is not a matter for the jury's consideration providing, of course, that the jury's right to determine matters bearing on the suppression of evidence is not restricted. [14b] As stated, the record presents no ground for a reasonable belief of misconduct on the part of the prosecution in the instant case. (See *People* v. *Kroeger*, 61 Cal.2d 236, 246-247 [37 Cal. Rptr. 593, 390 P.2d 369].)

The court did not give an instruction on second degree murder or manslaughter, and instructed that defendants were either not guilty of murder at all or were guilty of murder of the first degree. It must be presumed that defen-

dants, if guilty of murder of the first degree, were guilty under the felony murder doctrine, as no instructions on premeditation and deliberation were given. (Pen. Code, § 189.) Thus, the jury was instructed, in effect, that if it found defendants committed the unlawful killing then it must further find that the killing occurred in the perpetration of a robbery. That a robbery had been committed is uncontroverted and appears as a matter of law.

The defendant Teale's only defense was a denial of the commission of the homicide. (See *People* v. *Turville*, 51 Cal. 2d 620, 633 [335 P.2d 678]; *People* v. *Imbler*, 57 Cal.2d 711, 715 [21 Cal.Rptr. 568, 371 P.2d 304].) Mrs. Chapman, in addition to a denial, submitted evidence tending to show that she lacked mental capacity to form the requisite intent. However, such testimony was to the effect that she suffered from a "disassociative reaction"; that when she found herself in an uncontrollable situation she would " 'black out' by simply not knowing."

[16] Defendants, who did not request an instruction on second degree murder or manslaughter, now complain that the court should have given such instruction on its own motion, and that the same were required on the theory that the homicide occurred in the perpetration of a felony other than one of those mentioned in section 189 of the Penal Code, that is, simple kidnaping. Thus, it is claimed, that since the jury found a simple kidnaping as well as the robbery had occurred such additional criminal act made it incumbent upon the court to instruct on second degree murder.

The foregoing contention is obviously without merit. Where, as here, the evidence compels a conclusion that a murder, if committed at all, was committed in the perpetration of a robbery and for that reason is murder of the first degree, it does not follow that if it further appears that such murder was committed in the perpetration of robbery *and* simple kidnaping it now becomes murder of the second degree. The fact that a second, lesser homicide has *also* been

committed does not require instructions thereon where, conceding the homicide, the greater offense appears as a matter of law. The only real question before the jury was thus whether defendants were the perpetrators of the homicide.

[17] It is contended that, at least as to Mrs. Chapman, her crime might have been manslaughter because she could not have entertained the specific intent to murder, but might have entertained the lesser intents associated with involuntary manslaughter. (See *People* v. *Modesto,* 59 Cal.2d 722 [31 Cal.Rptr. 225, 382 P.2d 33].) But an objective evaluation of the defendant's evidence as to her mental capacity does not permit a reasonable conclusion that she could not have acted with "malice aforethought" (Pen. Code, § 187), and at the same time have entertained an intent to commit an "unlawful act, not amounting to a felony" or a lawful act "in an unlawful manner, or without due caution and circumspection." (Pen. Code, § 192.) According to her expert witness' testimony she did not have the mental capacity to commit any crime. Hence, the jury was properly instructed that defendants were guilty of murder of the first degree or were not guilty of the unlawful commission of any homicide.

[18] Error is claimed by Mrs. Chapman in instructions given on the effect which intoxication of an accused may bear on the question of specific intent where such intent is an element of the crime charged.[1] The challenged instructions are similar to those condemned in *People* v. *Spencer,* 60 Cal.

[1] The portion of the instructions objected to were as follows: "Our law provides that no act committed by persons while in a state of voluntary intoxication is less criminal by reason of his or her having been in such condition. This means that such a condition, if shown by the evidence to have existed in the defendants at the time when allegedly they committed the crimes charged, is not of itself a defense. It may throw light on the occurrence and aid you in determining what took place; but when a person in a state of intoxication, voluntarily produced in himself, commits a crime, the law does not permit him to use his own vice as a shelter against the normal, legal consequences of his conduct."

2d 64, 86-87 [31 Cal.Rptr. 782, 383 P.2d 134]. Although further instructions which immediately followed properly stated the law, and, as in *Spencer*, "it appears that upon rather elaborate analysis a correct understanding of the relevant law can be gleaned from the instructions construed as a whole," nevertheless it was error to burden the jury with the confusing and contradicting instructions in such circumstances. However, for the reasons which follow, the error was harmless.

As in *Spencer*, the evidence of the defendant's intoxication was minimal and for that reason the erroneous instruction must be deemed nonprejudicial. (*People* v. *Spencer*, *supra*, 60 Cal.2d 64, 87.) Moreover, the defendant did not rely on intoxication in the ordinary sense. Her defense was that due to her emotional instability, coupled with the presence of alcohol in her system, she "blacked out" and suffered a complete mental disassociation. This theory was fully exploited by the defendant and in such circumstances the instant error on the effect of intoxication on ability to form a specific intent was not prejudicial.

[19] Defendant Chapman next claims that an instruction relating to confessions and admissions was not applicable to her, as she personally had made no such statements, and that it was prejudicial error to not so instruct the jury. In *People* v. *Burns*, 114 Cal.App.2d 566 [250 P.2d 619], it was held to be reversible error as to a nonconfessing defendant to fail to limit an instruction on confessions to his confessing codefendant. (See also, *People* v. *Wade*, 185 Cal.App.2d 226 [8 Cal.Rptr. 197].)

While it is true that the instruction on confessions and admissions was couched in general terms and, standing alone, would reasonably be construed to apply to Mrs. Chapman as well as Mr. Teale, it further appears that other instructions negated the error, if any, in the circumstances here prevailing. Moreover there was evidence of statements made by Mrs. Chapman, probably not amounting to admissions, which were testified to during the trial. Mrs. Chapman also made several statements which constituted admis-

sions but which were not put into evidence. Nevertheless, constant references were made to such statements by the various psychiatrists who testified, and defense counsel argued vigorously for the admission of an exhibit consisting of an 84-page statement by Mrs. Chapman. In each instance where a statement by Mrs. Chapman was referred to by a psychiatrist witness, the jury was admonished that the statement was not to be received as proof of the matters asserted, but only as going to the basis upon which the doctor had formulated his opinions. In addition the court instructed the jury at the close of the trial as follows: "During the course of this trial, psychiatrists have testified concerning the mental and emotional condition of defendant Ruth Chapman. During their testimony they related certain statements made by Mrs. Chapman to them. These statements were not evidence of the facts related, but were admissible only as they explained or formed a basis for the expert opinion of the psychiatrists concerning the mental and emotional condition of defendant Ruth Chapman."

It must be deemed, in view of the foregoing, that the jury was not misled as to those statements of Mrs. Chapman not received in evidence. As to extrajudicial statements which were received in evidence, the court instructed as follows immediately preceding the general instructions on confessions and admissions: "Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against the other defendant.

"In the trial of this case, there were instances when certain evidence was admitted as against one of the defendants, but denied admission as against the other.

"Your attention was called to these matters when the rulings were made. But I would urge you again to keep in mind the distinctions pointed out in such rulings, and their effect. It may be difficult for you, when considering the case for or

against any one defendant to completely disregard any evidence that you have heard or seen, but that is your plain duty with respect to evidence not admitted by the court as against that defendant, and you must try conscientiously to so treat such a situation.

"Where evidence has been received of a statement of a defendant after his or her arrest and in the absence of his codefendant, such statements can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against the codefendant.

"If in this trial any evidence has been received of a statement or admission of Thomas Leroy Teale after his arrest and in the absence of his codefendant, such statement can be considered only as evidence against Mr. Teale and cannot be considered for any purpose as evidence against Ruth Elizabeth Chapman.

"Likewise any evidence of a statement or admission of Ruth Elizabeth Chapman after her arrest and in the absence of her codefendant can be considered only as evidence against Mrs. Chapman and cannot be considered for any purpose as evidence against Thomas Leroy Teale."

In view of the foregoing specific instructions immediately preceding the general instructions on admissions and confessions we are persuaded to the conclusion that the jury reasonably could not have applied either Mrs. Chapman's excluded extrajudicial statements or the admissions which the defendant Teale made to his fellow inmate in determining the individual guilt of Mrs. Chapman.

No contention is made that any of the extrajudicial statements were received in evidence in violation of defendants' right to counsel as enunciated in *Escobedo* v. *Illinois*, 378 U.S. 478 [84 S.Ct. 1758, 12 L.Ed.2d 977], *Massiah* v. *United States*, 377 U.S. 201 [84 S.Ct. 1199, 12 L.Ed.2d 246], and *People* v. *Dorado*, 62 Cal.2d 338 [42 Cal.Rptr. 169, 398 P.2d 361], and it otherwise does not appear that defendants' rights in this regard have been infringed. In any event,

aside from Teale's statement to his fellow inmate, which clearly falls outside the proscription of *Escobedo, Massiah* and *Dorado,* the admission of other statements could not have resulted in a miscarriage of justice. (Cal. Const., art. VI, § 4½.)

[20] As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury, commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provision (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable."

The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteenth Amendments (*Griffin* v. *California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed. 2d 106], *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judgment of conviction. (*People* v. *Bostick*, 62 Cal.2d 820, 823-827 [44 Cal.Rptr. 649, 402 P.2d 529].)

It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instruction on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants

were not disposed to question the truth of the facts asserted by the prosecution's witnesses.

We are therefore of the opinion that in the absence of the erroneous comments and instructions a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale.

[21] Contention is also made by the defendant Teale that prejudicial error occurred in the penalty phase in the court's instructions, and the prosecutor's arguments going to the role played by the Adult Authority in fixing parole for those convicts sentenced to life terms. (*People* v. *Morse*, 60 Cal.2d 631 [36 Cal.Rptr. 201, 388 P.2d 33].) However, the instructions and arguments fall far short of those condemned in *Morse*.

The instruction to which exception is taken is as follows: "Further the law of this state provides that every person guilty of murder of the first degree shall suffer death or confinement in the state prison for life with the possibility of parole." And the language of the prosecutor to which particular objection is taken is as follows: "For example, if you feel that a term in prison, for example —, with all of the facilities for rehabilitation and so forth, would insure, insofar as human reason can infer, that these defendants, even if they are ultimately and they will be one day perhaps—there is a possibility if they are—the death penalty is not invoked, possibly they may be paroled.—They may not be, but again they may be. It is the law."

The jury was not advised of the role which the Adult Authority plays, the conditions under which parole is granted, statistical information relative to past and current practices in granting parole, or any of the other matters condemned in *Morse* as improper for the jury to consider. Insofar as appears the jury was advised only that a convict undergoing a life sentence might someday be paroled and the further obvious inference might be drawn from the

prosecutor's remarks that if the death penalty is invoked there is no possibility of parole. Manifestly, the invitation to the jury to speculate and surmise as to the improper release of a defendant to society in the future if a life instead of a death sentence is imposed, upon which *Morse* turned, is completely lacking in the instant case.

[22] As the evidence clearly indicates that all of the crimes charged and of which Mrs. Chapman stands convicted are inseparable, she was improperly sentenced for all three counts. (*People* v. *McFarland*, 58 Cal.2d 748 [26 Cal.Rptr. 473, 376 P.2d 449]; *People* v. *Houston*, 219 Cal.App.2d 187 [33 Cal.Rptr. 26].) Thus the judgment, insofar as it imposes punishment for robbery and kidnaping, the lesser crimes, must be reversed as to Mrs. Chapman. As the death penalty was imposed on the defendant Teale he is not affected by the multiple sentencing. (*People* v. *Seiterle*, 59 Cal.2d 703, 712 [31 Cal.Rptr. 67, 381 P.2d 947].)

The judgment is reversed insofar as it imposes sentences for robbery and kidnaping on Mrs. Chapman, and in all other respects is affirmed. The judgment as to the defendant Teale is affirmed in all respects.

Traynor, C. J., McComb, J., Peters, J., Tobriner, J., Schauer, J.,* and Dooling, J.,* concurred.

Appellants' petition for a rehearing was denied August 27, 1965, and the opinion was modified to read as printed above. Schauer, J.,* sat in place of Mosk, J., who deemed himself disqualified.

APPENDIX D

Constitutional Provisions and Statutes Involved

Fifth Amendment, United States Constitution:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 1, Section 13, California Constitution:

"In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; not be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. . . ."

Article 6, Section 4½, California Constitution:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

Section 187, Penal Code of California:

"*Murder.* Murder is the unlawful killing of a human being, with malice aforethought."

Section 207, Penal Code of California:

"Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act was committed, and brings, sends, or conveys such person within the limits of this state, and is afterwards found within the limits thereof, is guilty of kidnaping."

Section 209, Penal Code of California:

"*Kidnaping for Blackmail or Robbery—Punishment.* Any person who seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away any individual by any means whatsoever with intent to hold or detain, or who holds or detains, such individual for ransom, reward or to commit extortion or to exact from relatives or friends of such person any money or valuable thing, or any person who kidnaps or carries away any individual to commit robbery, or any person who aids or abets any such act, is guilty of a felony and upon conviction thereof shall suffer death or shall be punished by imprisonment in the state prison for life without possibility of parole, at the discretion of the jury trying the same, in cases in which the person or persons subjected to such kidnaping suffers or suffer bodily harm or shall be punished by imprisonment in the state prison, for life with possibility of parole in cases where such person or persons do not suffer bodily harm.

"Any person serving a sentence of imprisonment for life without possibility of parole following a conviction under this section as it read prior to the effective date of this act shall be eligible for a release on parole as if he had been sentenced to imprisonment for life with possibility of parole."

Section 211, Penal Code of California:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Section 825, Penal Code of California:

"*Accused Under Arrest to Be Allowed Counsel and to Be Brought Before Magistrate—Penalty for Denial.* The defendant must in all cases be taken before the magistrate without unnecessary delay, and, in any event, within two days after his arrest, excluding Sundays and holidays; provided, however, that when the two days prescribed herein expire at a time when the court in which the magistrate is sitting is not in session, such time shall be extended to include the duration of the next regular court session on the judicial day immediately following.

"After such arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of such prisoner, visit the person so arrested. Any officer having charge of the prisoner so arrested who wilfully refuses or neglects to allow such attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow any attorney to visit the prisoner when proper application is made therefor, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction."

APPENDIX E

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

"Mr. Ferguson: Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves . . ." (RT 1808:21-26.)

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both." (RT 1809:5-13.)

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know. I wasn't out there, you were not out there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an

adverse inference to any fact within their knowledge that they could testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are —you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

"So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity." (RT 1822: 15 to 1823:22.)

"Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being written, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that he had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had." (RT 1824:8-24.)

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you

have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentlemen that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court." (RT 1826:16 to 1827:22.)

"So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that they were at that scene, ladies and gentlemen, they were with that man

just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence, that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

"Mr. Ferguson: To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination." (RT 1827:24 to 1829:10.)

"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer." (RT 1838:9-18.)

"So you can see that whichever one of these defendants shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him." (RT 1840:22 to 1841:6.)

"We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard,

and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't, because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be evidence as to why she wrote the name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination." (RT 1844:19 to 1845:9.)

"We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows guilt." (RT 1845:5-14.)

"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one had in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell

you and who could have told you from evidence, from the witness stand, what that letter meant? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—" (RT 1848:12 to 1849:11.)

"Mr. Ferguson: He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they were under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon

was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him it was fully loaded. Once again, I don't know where the original is here, and you know the only two that can tell us where that is." (RT 1854:1-24.)

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you, you can draw an adverse inference." (RT 1854:24 to 1855:14.)

"Mr. Ferguson: Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in the side of the head, right here on the left in the general area of where the glasses would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case." (RT 1860:18 to 1861:4.)

"Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence." (RT 1861:22 to 1862:6.)

"You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10-11, there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

"Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it." (RT 1861:22 to 1862:6.)

"Mr. Ferguson: Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every opportunity to make his own comments, and I'm sure he'll most adequately express himself when the time comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just sug-

gested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable." (RT 1863:17 to 1864:17.)

"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version." (RT 1881:3-16.)

"I would say that there wasn't very much of anything that he said that he did prove.

"Once again, Mrs. Chapman did not take the stand and explain these things and tell us about them as she could have." (RT 1882:3-7.)

"We went through a business with a—dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased—when it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she in fact apparently wore on that night.

"So, I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it." (RT 1882:13 to 1883:2.)

"But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman upon that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't do directly, because there is no other way that he can get that thing before you without putting her up on that stand." (RT 1883:15-26.)

"I say, ladies and gentlemen, to make that evidence in this case would be so simple just to come up here and

sit on that witness stand and that would make it evidence in this case, but not when you get in indirectly what you can't do directly, and the only way they can do it directly is by putting that defendant on the stand." (RT 1886:3-8.)

"But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen, there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so." (RT 1889:5-21.)

". . . Mr. Johnson would have you believe that everything she said was the truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So, it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit. But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times." (RT 2106:4-16.)

"Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, whichever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sanctity and worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Why said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing. You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces'. It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really.

But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. 'A 'mouthpiece'." (RT 2108:17 to 2109:20.)

"Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood." (RT 2114:7-12.)

"Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all." (RT 2115:9 to 2116:2.)

"So far as the motive is concerned for the murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in

deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too." (RT 2256:14-26.)

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too." (RT 2257:12-19.)

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort. You don't know that as far as pulling the trigger. But this is a factor which has not been brought to light, and you can consider that

factor which has not been, from the standpoint there have been two people that might have explained that." (RT 2258:10 to 2259:3.)

"I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their background that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they have been fair with you.

"This is the chance that they take by not having taken the stand." (RT 2288:8-21.)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCT. TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LE ROY TEALE,

Petitioners,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

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printed by CALIFORNIA OFFICE OF STATE PRINTING

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On Writ of Certiorari to the Supreme Court of the State of California

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The original opinion of the California Supreme Court was set forth in 63 A.C. 175. A modification was set forth in 63 A.C. 269. The opinion as modified is reported in 63 Cal.2d 178, 404 P.2d 209, 45 Cal. Rptr. 729.

The various opinions are set forth in Appendices A, B, and C of the brief for petitioners.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28 Sec. 1257(3) United States Code.

The judgment of the Supreme Court of the State of California was entered on July 16, 1965. Timely petitions for rehearing were filed by each petitioner, Chapman and Teale. The opinion of the California Supreme Court was modified and each petition for rehearing was denied on August 27, 1965.

A timely petition for writ of certiorari was filed in this Court. A response was requested of respondent. After submission of the response, the petition for certiorari was granted on March 28, 1966, in 875 Misc. O.T. 1965. A stay of Mr. Teale's death sentence was granted by Mr. Justice Douglas pending the outcome of this proceeding.

STATUTES INVOLVED

The pertinent statutes and constitutional amendments, both state and federal are set forth in the Appendix hereto.

QUESTIONS PRESENTED

The questions set forth by this Court in its grant of certiorari are:

Where there is a violation of the rule of *Griffin* v. *California*, No. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?

STATEMENT OF THE CASE

Petitioners Ruth Elizabeth Chapman and Thomas L. Teale were convicted after a jury trial at which they were represented by separate counsel of the first degree murder of Billy Dean Adcock, robbery of the

first degree and simple kidnapping.[1] A life sentence was imposed upon petitioner Chapman as to the murder count (CT 347–349). The death penalty was imposed upon petitioner Teale (CT 343–346). After an automatic appeal pursuant to the provisions of

[1] Chronology of Proceedings in Trial Court:

On October 26, 1962, Mrs. Chapman was arrested in St. Joseph, Missouri, pursuant to a fugitive warrant (CT 18a, 58; RT 1037). She waived extradition and was voluntarily returned to California, leaving Missouri on October 28 (CT 58; RT 1054). On October 31, 1962, she was arraigned in the Lodi Judicial District Court on a complaint charging her with murder, robbery and kidnapping (CT 29). John L. Briscoe, public defender of San Joaquin County, was appointed to represent her (CT 29–30).

On November 2, 1962, Thomas Teale was arrested in New Orleans, La. (RT 1123). He was turned over to the custody of California officers on November 8, 1962 (RT 1064). He was returned to California and on November 13, 1962, was arraigned in the Lodi Judicial District Court, and John L. Briscoe, public defender of San Joaquin County, was appointed to represent him (CT 30).

On November 16, 1962, the Grand Jury of San Joaquin County returned an indictment against Mrs. Chapman and Mr. Teale charging them with the same offenses on which they had previously been charged and arraigned in the Justice Court (CT 1a–2b). They were arraigned in the Superior Court on this indictment on November 21 and John L. Briscoe, public defender was again appointed to represent them (CT 2a, 3a, 3b).

On December 11, they entered pleas of not guilty to each count of the indictment and waived time for trial (CT 3d, 4a, 5a). February 5 was set for the trial date (CT 3d, 4a).

On January 29, 1963, the public defender presented a motion to withdraw as counsel for petitioner Chapman on the ground of a conflict of interest between her and petitioner Teale, which was granted (CT 4, 7a, 8a). The trial date was then set for March 19, 1963 (CT 4, 23a, 24a, 82a, 83a). On February 5, 1963, Richard Johnson was appointed as counsel for petitioner Chapman and Thomas Krehbiel was associated with him (CT 5, 14a, 15a). A motion for discovery was filed by counsel for petitioner Chapman and granted (CT 5, 25).

On February 14, 1963, petitioner Chapman filed a motion for separate trials on the ground that Mr. Briscoe who was now

section 1239b[2] of the California Penal Code, the judgment for murder as to petitioner Chapman was affirmed but insofar as the judgment imposed punishment for the robbery and kidnapping counts, lesser crimes, it was reversed (Calif. Pen. Code § 654).[3] The judgment as to petitioner Teale was affirmed in all respects since the death penalty was imposed and he could not be therefore affected by the multiple sentencing (*People v. Teale and Chapman*, 63 Cal.2d 178, 404 P.2d 209, 45 Cal.Rptr. 729).

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representing petitioner Teale had been her counsel for a period of 91 days, had received confidential communications from her and their interests were now in conflict (CT 29–37, 41). The motion for separate trial was denied but the court granted the motion for the public defender, Mr. Briscoe, to be relieved as counsel for petitioner Teale and Nels Fransen was appointed as his counsel (CT 58a–59a, 63a, 64a, 60–61).

Counsel for petitioner Teale then made a motion to withdraw Teale's plea of not guilty for the purpose of moving to set aside the indictment and moved to set aside the indictment (CT 62–67, 85a–99a). Both motions were denied (CT 78–79, 99a). Counsel for Teale filed a motion for continuance for 30 days to permit him to prepare for trial. This motion was granted and the trial date set over to April 16, 1963 (CT 78–79, 111a).

Meanwhile on March 6, 1963, petitioner Chapman filed a petition for writ of mandate with the Third District Court of Appeal, 3 Civil 10673, to compel the trial to proceed on March 19 (CT 352–393). This petition was denied (CT 458).

On March 19, 1963, petitioner Teale sought a writ of prohibition from the Third District Court of Appeal to prohibit the trial on the ground of lack of reasonable and probable cause to support the indictment (3 Civil 10679; CT 433–467). This was denied (CT 92).

On April 2, 1963, petitioner Chapman filed a petition for writ of prohibition with the Third District Court of Appeal, 3 Civil 10688 to halt the trial for alleged failure to accord her a speedy trial (CT 394–432). This was denied on April 4, 1963 (CT 459) and the trial proceeded beginning April 16, 1963 (CT 94).

[2] See Appendix.
[3] See Appendix.

On October 17, 1962, petitioners registered at a motel in Fresno, California, where they gave a bad check in payment of their room rental (RT 769–770, 773, 1256). At approximately 10 p.m. on that same day they entered Croce's Tavern near Lodi, California, where they remained for nearly three hours and together consumed five bottles of beer (RT 776–777, 781, 783–4, 802, 828). Mrs. Chapman went outside for awhile and upon her return was heard to say to Teale: "Let's go, we are not going to do anything here", or "We can't do anything here, let's go" (RT 783, 784, 814). They then left the tavern together (RT 781, 784). They were not drunk (RT 784, 812, 828).

Petitioners next appeared the following morning at about twenty minutes to two at the "Spot Club" in Lodi (RT 841, 860). At about ten minutes to two when the bar clock showed two o'clock and closing time, they were the only persons left in the bar with the bartender Adcock (RT 845, 846, 863). Shortly after closing time, 2 a.m., three persons, including the bartender and a woman of Mrs. Chapman's general description were observed in front of the Spot Club (RT 887, 891, 892). The third person in the group, a man resembling the petitioner Teale in general appearance, was standing behind the bartender, who apparently was locking the door of the tavern (RT 887, 891).

The following morning the owner of the bar found it to be in unusual disarray (RT 906, 907, 974, 988, 997). The cash register had been broken into and ap-

proximately $260 was missing (RT 985, 987, 994, 998–999). Papers usually kept in the register were scattered about the floor (RT 988). Routine housekeeping tasks which the bartender generally completed before leaving had not been performed (RT 974, 997, 1001–1002, 1004, 1005).

Later that morning, October 18, 1962, at about 9:30 a.m., the victim's body was found in a remote area north of Lodi (RT 922, 928). It was half submerged in an open ditch by the side of the road (RT 924). The clothing was torn and there was blood on the face and on the surface of the road nearby (RT 934–5). The victim had been shot three times in the head, two bullets apparently penetrating through the same wound on the left side of the head from a gun held as close as two inches (RT 713–714, 720, 723). The third bullet entered the back of the head from a gun held some 18 inches away (RT 723). The time of death from the gunshot wounds was estimated at 3:00 o'clock on the morning of the 18th (RT 724).

The bullets which inflicted the deceased's wounds were fired from a .22 caliber weapon similar to a gun purchased by the petitioner Chapman in Reno, Nevada, while there with Teale six days before the killing (RT 752–756, 760–764, 1284–1286).

Neither the gun which she purchased nor the gun which fired the fatal bullets was located.

Numerous items of personal property were found in the vicinity of the body, including the victim's wallet from which $50 to $65 in cash had been re-

moved and a check for $2 bearing a stamp "Refer to Maker", which had been signed by Mrs. Chapman (RT 898, 939, 946, 947, 948; Peo. Exh. 33, RT 946).

Evidence connecting petitioners with the commission of the crime was submitted by an expert witness for the People who testified that the victim's blood was Type A (RT 1308); that Type A blood was found on the right side of the front floor mat, spattered on the overhead fabric liner, the dome light and clothes rack in the back of petitioner's vehicle (RT 1308, 1318–1323, 1324–1325); that blood had spattered or radiated out from the right front side of the automobile (RT 1318–1323); that Type A blood was found on Mrs. Chapman's fur stole and spattered on a dress, blouse, skirt and shoes in her possession (RT 1297, 1298, 1300, 1301–1302, 1328); that Type A blood was also found on petitioner Teale's shirt and jacket (RT 1302, 1303–5); that numerous fibers taken from the victim's shoes matched those found in the petitioner's automobile (RT 1351–1356); that hairs were found in the automobile which matched those of the victim (RT 1358); that red paint found on the floor mat of the petitioner's automobile came from the shoes of the victim (RT 1358–1362); and that in the opinion of the expert criminologist the victim had been in the petitioner's automobile (RT 1363).

Petitioner Teale was arrested in New Orleans on November 2, 1962, by the FBI on a fugitive warrant (RT 1123, 1125). While he was being booked and photographed in the FBI office after being told of

the charges against him and after having been advised of his rights to an attorney, that he did not have to furnish any information and anything he said could be used against him (RT 1125) Teale stated: "Well, they'll have a hard time proving I was there" (RT 1139).

At the time of his arrest, Teale carried a gun which had been purchased by Mrs. Chapman in Reno on the same day on which she had purchased the .22 caliber weapon previously mentioned and he was driving the automobile which had been in petitioner's possession before and at the time of the killing (RT 744, 752–756, 760–764, 1125–1126).

After his return to California, Teale was confined with one Waldo Vowel, another prisoner who testified as to a conversation he had with Teale wherein Teale stated that "he hoped Mrs. Chapman did not break down and start saying anything, because they didn't have anything on them yet" (RT 1431). Later, the witness testified he had another conversation with Teale in the prison yard: "I told him I knew Bill (the deceased), and he (Teale) told me he didn't plan for it to happen that way, and he started relating to me how it happened [RT 1431–2]. He said that they were arguing over money all afternoon, and he said it was his idea to rob him and said he was going to take him out in the country and just run him off up through the vineyard, or something like that, but had no idea of killing him [RT 1432]. But he said when they pulled up and stopped, that he opened the

door, he didn't say who was driving or nothing, just said when they stopped that he got out to go around —go around to the other side of the car to get Adcock out, and said that Mrs. Chapman shot him once in the back of the head, and then said when he fell, before he could get around the car, he said she shot him two more times" (RT 1432). Teale further stated, according to the witness, that "they" could never find the gun (RT 1432–1433). In response to a question as to any statements Teale might have made regarding expected punishment, the witness stated: "Well, he said out there in the yard, he said if they had anything on him, he said he was going anyway, and he didn't want Mrs. Chapman to 'cop out' or anything, because he said if she didn't, you'd have to prove which one of them done it. Said he was going anyway, it didn't make any difference. So he said if she just kept quiet that she might get off with just seven or eight years" (RT 1435).

Mrs. Chapman was arrested by an agent of the FBI in St. Joseph, Missouri, on October 26, 1962 (RT 1037). At the time she was arrested pursuant to a fugitive warrant she was at the home of Alberta Smith, a sister of petitioner Teale (RT 1037). The officers took her personal effects as well as those she had at the residence where she was apprehended (RT 1038–9, 1043). She was temporarily lodged in the jail in St. Joseph (RT 1038).

On October 28, 1962, the Lodi police officers and a matron took her in custody (RT 1054). Mrs. Chapman

waived extradition and voluntarily returned with the officers to California (CT 58; RT 1054).

During the time she was questioned by the FBI she answered as to her activities prior to leaving California. She stated first that she had been in Ukiah from the 17th to the 20th of October, on which latter date she left by bus for St. Joseph (RT 1724–1725). She later stated to them that on the evening of the 17th and early morning of the 18th she had waited in a bus depot in San Francisco (RT 1726).[4]

It was stipulated at the trial that a registration card for occupancy of a motel room by a "Mr. and Mrs. T. L. Rosenthal" in Woodland, Califorina, at 4:40 a.m. on October 18th was made out in her handwriting (RT 1016–1021; Peo. Exh. 46). The clerk of the motel also testified that the registrant gave a false license number and that the parties arrived in an automobile which was the one found in Teale's possession at the time of his arrest in Louisiana (RT 1016–1021).

Mrs. Teale also denied that she suffered from blackouts when she spoke to the FBI agent in St. Joseph (RT 1724–6).

Mrs. Chapman's defense was to the effect that she was incapable of forming an intent during the period in question and hence she could not have been guilty of the offenses. She did not take the stand but produced this defense through a psychiatrist who ex-

[4] These statements were elicited from the FBI agent on direct examination when called as petitioner Chapman's witness (RT 1724–6).

pressed his opinion that she suffered a hysterical alcoholic type of amnesia; that she underwent a "dissociative reaction" (she blacked out by simply not knowing) and he placed the point of inception of this state at the time of petitioner Chapman's alleged beating by petitioner Teale outside of the Croce bar in Lodi (RT 1557, 1579, 1580). She also introduced evidence through her past employers and her daughter as to an alleged mental breakdown in the past and her previous drinking habits (RT 1702–3, 1704–5, 1707–8, 1745–6, 1747–8, 1749, 1783, 1784–5, 1791).

In rebuttal the prosecution called a psychiatrist who examined Mrs. Chapman and was of the opinion that she could have had an attack of amnesia but that if this had occurred, it took place at the time the shot was fired which was after the time the robbery had been committed and that prior to that time she was capable of forming an intent (RT 1769–1773).

Neither petitioner took the stand to testify.

During the argument the prosecution commented on numerous occasions regarding the failure of either petitioner to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman (RT 1808–9, 1826–7, 2106, 2115–6); funds or the lack thereof in Mr. Teale's possession immediately prior to the killing (RT 1824–1825); the amount of intoxicating liquors consumed by petitioners at the Spot Club and other taverns (RT 1838); the circumstances of the shooting in the auto-

mobile (RT 1840–1841); the removal of the victim's body from the automobile (RT 1822–3, 1860–1861); who fired the fatal shots (RT 1840–1841, 2256); why petitioners used a false registration at a motel shortly after the killing (RT 1844–5, 1846); the meaning of a letter written by Mrs. Chapman several days after the killing (RT 1848, 1849); why Teale had a loaded weapon in his possession when apprehended (RT 1854–1855); the meaning of statements made by Teale after his apprehension (RT 1855); why certain clothing and articles of personal property were shipped by petitioners to Missouri (RT 1861, 1862–3, 1864); what clothing Mrs. Chapman wore at the time of the killing (RT 1882); conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing (RT 1889); and generally, the overall commission of the crime (RT 1809, 1822–3, 1826, 1827, 1829, 1881, 1882, 1883, 1886, 2257, 2258, 2288).

The court in its instruction to the jury and in accordance with the California constitutional provision (Cal. Const. Art. I, § 13) [5] stated, among other things, that the failure of petitioners to testify from facts within their knowledge in explanation of incriminating evidence may be deemed as tending to indicate the truth of such incriminating evidence and "that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable" (CT 204–5; RT 2162–2163).

[5] See Appendix.

SUMMARY OF ARGUMENT

A violation of the comment rule as enunciated by this Court in *Griffin* v. *California*, 380 U.S. 609, in a case tried prior to the *Griffin* decision does not constitute prejudicial error per se. The application to such a situation of California's harmless error rule, which meets federal standards, neither constitutes a denial of due process of law nor a patent disregard of this Court's decisions. California's harmless error rule was properly applied to the facts of the case where the evidence of guilt was overwhelming.

ARGUMENT

I. A Violation of the Comment Rule in a Case Tried Prior to the Decision in *Griffin* v. *California*, 380 U.S. 609, Does Not Warrant a Reversal But Such Error May Properly Be Saved by the Application of a State Harmless Error Rule

A. A Violation of the Comment Provision Is Not Prejudicial Error Per Se Warranting a Reversal

In *Twining* v. *New Jersey* (1908) 211 U.S. 78, 90–91, 29 S.Ct. 14, 53 L.Ed. 97, the court assumed that the comment involved infringed the federal privilege against self-incrimination but held that the Fourteenth Amendment did not require the states to grant that privilege. *Adamson* v. *California* (1947) 332 U.S. 46, 50, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223, was a case where the court again assumed that the comment would violate the privilege but followed *Twining* in holding that the Fifth Amendment was not binding upon the states. *Malloy*

v. *Hogan* (1964), 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, overruled the two previous cases and applied the Fifth Amendment to the states through the Fourteenth. To the same effect was *Murphy* v. *Waterfront Com.* (1964), 378 U.S. 52, 84 S.Ct. 1594, 12 L.Ed.2d 678.

Griffin v. *California* (1965), 380 U.S. 609, 14 L.Ed. 2d 106, 85 S.Ct. 1229, held that the limited comment rule provided for by the California Constitution, Article I, section 13, violated the Fifth Amendment and that the instruction based thereon (CALJIC 51 Rev.) was error. With respect to California's limited comment rule, this Court stated:

> "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. . . ."

(14 L.Ed.2d 106, 109–110.) The question of retroactivity of this decision was not discussed in *Griffin*. However, in *Tehan* v. *Shott* (1966), 382 U.S. 406, 86 S.Ct. 459, 15 L.Ed.2d 453, the court held that the *Griffin* doctrine would not be applied retroactively. It applied the same test with respect to retroactiveness that it had adopted with relation to illegally obtained evidence in *Linkletter* v. *Walker* (1965), 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601. That is, the court held the rule of *Griffin* would not be applicable to those cases in which the judgment of conviction was rendered, the availability of appeal exhausted and the time for petition for certiorari elapsed or a

petition for certiorari finally denied before April 28, 1965, the date of the *Griffin* decision.

Although the conviction in the case at bar was obtained in 1963, the processes on direct appeal had not been completed prior to *Griffin* and hence the *Griffin* rule would apply save for the application of a harmless error rule.[6]

Tehan v. *Shott,* 382 U.S. 406, *supra,* affirmed the principle that one of the basic tenets that underlie the privilege against self-incrimination was the preservation of the "integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load'." The prosecution in the case at bar shouldered the entire load which must be done in all California cases (*People* v. *Bostick,* 62 Cal.2d 820, 44 Cal.Rptr. 649, 402 P.2d 529).

Petitioners urge that any comment contrary to *the Griffin doctrine* warrants a reversal per se and attempt to equate the use of such prohibited comment with cases relating to the introduction of involuntary or coerced confessions or cases involving a denial of the right to counsel. In the involuntary or coerced confession cases relied upon by petitioner the court has held that such confessions tainted the entire proceedings and the error was so fundamental that it

[6] In this respect it should be noted that no charge of bad faith or a flaunting of the court's rulings may be attributed to the prosecution. The action of the prosecution was proper under California law and decisions of this Court at the time it was taken although later developments of the law have rendered it erroneous.

would not be wiped from the jury's mind as a man's confession was the strongest evidence of guilt. (*Bram* v. *United States* (1897), 168 U.S. 532, 42 L.Ed. 568, 18 S.Ct. 183; *Moore* v. *Dempsey* (1923), 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265; *Chambers* v. *Florida* (1939), 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472; *Faye* v. *Noia* (1963), 372 U.S. 391, 9 L.Ed.2d 837, 83 S.Ct. 822; *Massiah* v. *United States* (1964), 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199; *Escobedo* v. *Illinois* (1964), 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758.) By the use of such involuntary confessions it could be possible that the guilt-determining process was unreliable and an innocent individual would be punished.

The same principle would permeate those cases in which a defendant was not afforded his right to counsel which precluded him from having a fair trial or a direct appeal (*Gideon* v. *Wainwright* (1963), 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792, 93 A.L.R.2d 747; *Douglas* v. *California* (1963), 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814).

The principles set forth in these cases have been retroactively applied except for those involving the *Escobedo* principles on the ground that these constitutional errors were of such gross magnitude that they infected the entire proceedings and presented a clear danger of convicting the innocent, hence a violation of either principle denied a defendant his day in

court and did not accord with the standards of American justice.

Such reasoning, however, should not be attributed to a violation of the comment provision. It does not render the guilt-determining process unreliable nor would it cause an innocent individual to be punished. It is merely a way of directing the jury's attention to the self-evident facts.

This court in its prior decisions has indicated that it will not reverse for every acknowledged constitutional error even though some may have related to comment or even alleged denial of counsel.

For example, in *Snyder* v. *Massachusetts,* 291 U.S. 97, 54 S.Ct. 330, 78 L. Ed. 674, 90 A.L.R. 575, it was held that the fact that the defendant was absent from such a minor portion of the proceedings against him did not result in prejudice. Again, in *Johnson* v. *United States,* 318 U.S. 189, 63 S.Ct. 549, 87 L.Ed. 704, it was held that comment on the defendant's reliance on his privilege against self-incrimination was error but the error had been waived. This was not a declaration that the error was nonprejudicial but an indication that a denial of due process is not always reversible error per se.

Wilson v. *United States* (1893), 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650, was reversed because of the prosecutor's comment on the defendant's failure to take the stand as a witness. The comment was held to be error specifically for the reason that a federal

statute provided that no presumption shall be created against defendant by reason of his decision not to testify.

There this court used the following language:

> "We do not see how this statute can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases *where the proofs of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause.*" (Italics added.)

To the same effect see *Coleman* v. *Denno* (D.C. S.D. N.Y. 1963), 223 F.Supp. 938, affirmed in *United States* v. *Denno* (2d Cir. 1964), 330 F.2d 441; *United States* v. *Knox Coal Co.* (3d Cir. 1965), 347 F.2d 33; *Cloud* v. *United States* (8th Cir. 1966), 361 F.2d 627.

It would thus appear that in not every case has an alleged constitutional error warranted a reversal per se.

B. The Harmless Error Rules

All fifty states, the District of Columbia and the federal courts have harmless error rules. They are but a recognition of the fact that human beings are fallible and that a defendant is entitled to a fair trial but not a perfect one.

Prior to the adoption of legislation on the subject by Congress, the harmless error rule in federal criminal cases as defined by case law held that error required reversal unless the opposing party could

affirmatively demonstrate that it was harmless (*Rich* v. *United States* (CA8 1921), 271 F. 566; *Hall* v. *United States* (1921), 277 F. 19). The same situation pertained in California prior to 1911 the date of the adoption of Article VI, section 4½ of the Constitution even though the statutes had provided that judgments should not be reversed because of technical errors or defects which did not affect the substantial rights of the defendants (Calif. Pen. Code §§ 1258, 1404).[7] The California courts prior to 1911 in reviewing convictions in criminal cases had generally followed the rule that prejudice would be presumed from error.[8]

On February 26, 1919, the federal harmless error rule was embodied in legislation.[9] Judicial Code, section 269, was amended at that time by the addition of the second sentence which provided that:

> "On the hearing of any appeal, certiorari, writ of error or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

This court stated in *Kotteakos* v. *United States* (1946), 328 U.S. 750, 90 L.Ed. 1557, 66 S.Ct. 1239,

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[7] See Appendix.

[8] *People* v. *Williams*, 18 Cal. 187, 194; *People* v. *Murphy*, 47 Cal. 103, 106; *People* v. *Stanley*, 47 Cal. 113, 119 (17 Am. Rep. 401); *People* v. *Furtado*, 57 Cal. 345, 347; *People* v. *Sansome*, 84 Cal. 449, 451, 24 P. 143; *People* v. *Moore*, 103 Cal. 508, 511, 37 P. 510; *People* v. *Richards*, 136 Cal. 127, 68 P. 477.

[9] Act of February 26, 1919, C. 48, 40 Stat. 1181.

that the purpose of section 269 of the Judicial Code was to substitute judgment for automatic application of rules and to preserve review as a check upon arbitrary action and essential unfairness in a trial. At the same time, it was to make the process perform that function without giving men fairly convicted the multiplicity of loopholes which any highly rigid and minutely detailed scheme of errors, especially in relation to procedure, would engender and reflect in a printed record. In enacting this section, Congress intended to put an end to the too rigid application of the rule that error being shown, prejudice is presumed, and to establish a more reasonable rule that if upon an examination of the entire record, substantial prejudice does not appear, the error must be regarded as harmless. The crucial thing was the impact of the thing done wrong on the minds of other men in the total setting. The test adopted was what effect the error had or reasonably may be taken to have had upon the jury's decision.

In 1948, Congress effected a substantial revision of Titles 18 and 28 of the United States Codes. In Title 18, Rule 52 of the Federal Rules of Criminal Procedure, harmless error is defined: "any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded" and plain error is defined as "plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

In 1949, section 2111 of Title 28 was enacted to provide that "on the hearing of any appeal or writ of

certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." [10]

It thus appears that under the federal harmless error rule it is generally the case that prejudice will not be presumed from error in the record but that the party urging reversal because of error must show prejudice. Where, however, error does occur in a criminal case, which within the range of reasonable possibility, may have affected the verdict of the jury, the defendant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence the verdict, and if the record fails to disclose this, the verdict may not stand. A defendant may not however wait for a court to consider errors of its own motion (*United States* v. *Kolakowski* (4 Cir. 1963), 314 F.2d 699).

In this field, however, it must be remembered that the federal courts are acting under the federal supervisory power as well as the federal statutes.

The California harmless error rule is contained in Article VI, section 4½ of the California Constitution which was adopted in 1911 to apply to criminal cases and amended to apply to civil cases in 1914. It reads:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection

[10] By this statute Congress sought to make certain that the existing law as to harmless error would be applied by the federal appellate courts (1949 U.S. Code and Congressional Service, p. 1272).

of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

With the advent of this section, California courts no longer followed the concept that prejudice would be presumed from error and that it warranted reversals. Now the appellate courts were to determine whether such error, if it occurred, resulted in a "miscarriage of justice." To accomplish this result the appellate court was required to review the evidence so as to form an "opinion" as to whether the assigned errors had affected the outcome of the case and hence resulted in a "miscarriage of justice."

In determining the meaning of this phrase "miscarriage of justice" the courts of California have stated the test to be applied in varied language. Emphasis has been placed on the constitutional requirements of a fair trial and due process.[11]

[11] Cf. *People* v. *Saraszawski*, 27 Cal.2d 7, 11, 161 P. 2d 934; *People* v. *Mahoney*, 201 Cal. 618, 627, 258 P. 607; *People* v. *Hall*, 199 Cal. 451, 458, 249 P. 859; *People* v. *Kelso*, 25 Cal.2d 848, 852-853 155 P.2d 819; *People* v. *Gonzales*, 24 Cal. 2d 870, 877, 151 P.2d 251; *People* v. *Carnine*, 41 Cal.2d 384, 392, 260 P.2d 16; cases collected in "Appellate Review of Criminal Convictions on Appeal," 43 Cal.L.Rev. 381; *People* v. *Cotter*, 63 Cal.2d 386, 46 Cal.Rptr. 622; 405 P.2d 862; *People* v. *Jacobson*, 63 Cal.2d 319, 329, 46 Cal.Rptr. 515, 405 P.2d 555; *People* v. *Mitchell*, 63 Cal. 2d 805, 48 Cal.Rptr. 371, 409 P.2d 211; *People* v. *Failla*, 64 A.C. 613, 620, 51 Cal.Rptr. 103, 414 P.2d 39; *People* v. *Talbot*, 64 A.C. 751, 771, 51 Cal.Rptr. 417, 414 P.2d 633.

In *People* v. *Watson*, 46 Cal.2d 818, 299 P.2d 243, the California Supreme Court restated its test in the following language:

> "That a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."
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> * * * * * *
>
> "Nevertheless, the test as stated in any of the several ways, must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated."

By the use of the term "reasonable probabilities" and the rejection of the term "mere possibilities" the California court did not deviate from the standard enunciated by this Court in *Fahy* v. *Connecticut* (1963), 375 U.S. 85, 84 S.Ct. 229, 11 L.Ed.2d 171, which reversed a conviction for the admission of illegally obtained evidence without consideration of whether a state harmless error rule or a federal one should have been utilized. There the court stated, 375 U.S. p. 86:

> "We are not concerned here with whether there was 'sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.'"

It is apparent that the California courts have equated this *Fahy* standard with that adopted by California and have considered the phrases as having the same meaning (*People* v. *Jacobson*, 63 Cal.2d 319, 331, 46 Cal.Rptr. 515, 405 P.2d 555; *People* v. *Cotter*, 63 Cal.2d 386, 398, 46 Cal.Rptr. 622, 405 P.2d 862; *People* v. *Mathis*, 63 Cal.2d 416, 434, 46 Cal.Rptr. 785, 406 P.2d 65).

There is no question but that California courts have applied their harmless error rule to alleged constitutional errors such as a violation of the comment rule in a myriad of both reported and unreported cases.[12] Virtually all of these cases were tried before the court's decision in *Griffin* v. *California*, 380 U.S. 609, *supra*, but the appellate processes had not been completed. There is no question but that in cases wherein the California courts were of the opinion that the now prohibited comment would have caused a "miscarriage

[12] *People* v. *Luckman*, 235 Cal.App.2d 75, 45 Cal.Rptr. 41; *People* v. *Parker*, 235 Cal.App.2d 100, 44 Cal.Rptr. 909; *People* v. *Davis*, 235 Cal.App.2d 214, 45 Cal.Rptr. 297; *People* v. *Wozniak*, 235 Cal.App.2d 243, 45 Cal.Rptr. 222; *People* v. *Daugherty*, 235 Cal.App.2d 564, 45 Cal.Rptr. 528; *People* v. *Propp*, 235 Cal.App.2d 619, 45 Cal.Rptr. 690; *People* v. *Erb*, 235 Cal.App.2d 650, 45 Cal.Rptr. 503; *People* v. *Estrada*, 236 Cal.App.2d 221, 45 Cal.Rptr. 904; *People* v. *Huggins*, 236 Cal.App.2d 578, 46 Cal.Rptr. 199; *People* v. *Butts*, 236 Cal. App.2d 817, 46 Cal.Rptr. 362; *People* v. *Collier*, 237 Cal.App.2d 259, 46 Cal.Rptr. 887; *People* v. *Fontaine*, 237 Cal.App.2d 320, 46 Cal.Rptr. 855; *People* v. *Boyden*, 237 Cal.App.2d 695, 47 Cal.Rptr. 136; *People* v. *Padilla*, 240 A.C.A. 115; *People* v. *Phillips*, 240 A.C.A. 206; *People* v. *Bowman*, 240 A.C.A. 360; *People* v. *Potter*, 240 A.C.A. 687; *People* v. *Culp*, 241 A.C.A. 445; *People* v. *Gills*, 242 A.C.A. 868; *People* v. *Romero*, 244 A.C.A. 564.

of justice" reversals were ordered.[13] Thus it is apparent that the section has been so applied by California courts that where there is a reasonable possibility of the constitutional error affecting the outcome of the case the courts have reversed and afforded full protection to the defendants.

Similar rulings have been had by other states such as Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Massachusetts, Montana, Missouri, Nevada, New Jersey, Ohio, Oregon, Pennsylvania, Texas, Tennessee, Washington, and Wisconsin with relation to other types of constitutional errors which cases have been saved by the application of their harmless error rules.[14]

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[13] *People* v. *Keller*, 234 Cal.App.2d 395, 44 Cal.Rptr. 432; *People* v. *Sigal*, 235 Cal.App.2d 449, 45 Cal.Rptr. 481; *People* v. *Steele*, 235 Cal.App.2d 798, 45 Cal.Rptr. 601; *People* v. *Odom*, 236 Cal.App.2d 876, 46 Cal.Rptr. 453; *People* v. *Banks*, 238 A.C.A. 356; *People* v. *Staten*, 238 A.C.A. 601; *People* v. *Moore*, 239 A.C.A. 64; *People* v. *Davenport*, 240 A.C.A. 354; *People* v. *Mortenson*, 241 A.C.A. 173, 677.

[14] *Biele* v. *State* (Ala.) 371 P.2d 811 (self-incrimination); *State* v. *Carpenter* (Ariz.) 405 P.2d 460 (counsel); *Melton* v. *People* (Colo.) 401 P.2d 605 (illegally obtained evidence); *Casso* v. *State* (Fla.) 182 So. 2d 252 (illegally obtained evidence); *Kimmons* v. *State* (Fla.) 178 So. 2d 608 (illegally obtained evidence); *Shelly* v. *State* (Ga.) 132 S.E.2d 228 (illegally obtained evidence); *People* v. *Taylor* (Ill.) 204 N.E.2d 734 (counsel); *People* v. *Robinson* (Ill.) 211 N.E.2d 697 (counsel); *Commonwealth* v. *Palladino* (Mass.) 195 N.E.2d 769 (illegally obtained evidence); *State* v. *Sorenson* (Minn.) 134 N.E.2d 115 (illegally obtained evidence); *State* v. *Noble* (Mont.) 384 P.2d 504 (inadmissible evidence); *State* v. *Brown* (Mo.) 404 S.W.2d 179; *Dean* v. *Fogliani* (Nev.) 407 P.2d 580 (illegally obtained evidence); *State* v. *Wade* (N.J.) 214 A.2d 411 (counsel); *State* v. *Doyle* (N.J.) 186 A.2d 499 (illegally obtained evidence); *State* v. *Waldbillig* (Ohio) 203 N.E.2d 361 (illegally obtained evidence); *State* v. *Thomas* (Ore.)

California's harmless error rule was upheld as against a contention that it violated the Fourteenth Amendment in *People* v. *Cowan,* 44 Cal.App.2d 155, 159, 112 P.2d 162 and *Sampsell* v. *People of the State of California* (9 Cir. 1951), 191 F.2d 721, 726.

Even in states which prior to *Griffin* had not permitted the limited comment which was permitted by California courts questions have arisen as to what was forbidden comment. Judicial interpretation of what constituted forbidden comment varied. Traditionally it was recognized that the prosecuting attorneys might comment on the weight and sufficiency of the evidence. Now is the prosecutor to be restricted from making reference to this? Where the prosecuting attorney has commented that the evidence is uncontradicted and the nontestifying defendant is the only party who could contradict the evidence there has been a difference of opinion among the courts as to whether or not this has been an implied comment on the defendant's failure to testify.[15]

Hence it is apparent that even where there has been a previous recognition of comment as violating the defendant's privilege against self-incrimination, there

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400 P.2d 549 (admission of evidence); *Commonwealth* v. *Coyle* (Pa.) 203 A.2d 782 (counsel); *McCain* v. *State* (Tex.) 363 S.W.2d 257 (illegally obtained evidence); *State* v. *Moran* (Tenn.) 385 S.W.2d 912 (illegally obtained evidence); *State* v. *Craig* (Wash.) 406 P.2d 599 (exemplars); *Hemmis* v. *State* (Wis.) 129 N.E.2d 209 (illegally obtained evidence).

[15] *Desmond* v. *United States,* 345 F.2d 225, 227 (1st Cir.); *Lambert* v. *State,* 199 Miss. 780, 25 So.2d 477, 479–480; cf. *People* v. *McMahon,* 244 Ill. 45, 91 N.E. 104, 109; *Commonwealth* v. *Morrison,* 180 Pa. Super. 121, 118 A. 2d 258, 261.

has been no uniformity of opinion as to what constitutes such prohibited comment. Under such circumstances, it is readily apparent that harmless error rules have properly been applied by the states to save cases where the evidence of guilt is great and the error one that does not subvert the administration of justice.

It should be noted that in considering whether or not prohibited comment may be cured by a state harmless error rule, the failure of the defendant to testify is before the jury. Whether or not the court or prosecutor comments on such failure the jury will draw inferences therefrom. It will expect the defendant to present all the evidence he can to escape conviction and will naturally infer that his failure to explain or deny evidence against him when the facts are peculiarly within his knowledge arises from his inability to do so (*People* v. *Modesto,* 62 Cal.2d 436, 42 Cal.Rptr. 417, 398 P.2d 753). Such comment is not the type of error that pervades the entire trial so as to deny due process and a fair trial. It certainly should not be considered the type of error that is reversible per se (*In re Gaines,* 63 Cal.2d 234, 45 Cal.Rptr. 865, 404 P.2d 473). This court recognized the same principles when it stated in *Tehan* v. *Shott,* 382 U.S. 406, 416:

> "As in *Mapp,* therefore, we deal here with a doctrine which rests on considerations of quite a different order from those underlying other recent constitutional decisions which have been applied retroactively. The basic purpose of a trial is the determination of truth, and it is self-evident that to deny a lawyer's help through the technical intri-

cacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. See *Gideon* v. *Wainwright,* 372 U.S. 335; *Doughty* v. *Maxwell,* 376 U.S. 202; *Griffin* v. *Illinois,* 351 U.S. 12; *Eskridge* v. *Washington Prison Board,* 357 U.S. 214. The same can surely be said of the wrongful use of a coerced confession. See *Jackson* v. *Denno,* 378 U.S. 368; *McNerlin* v. *Denno,* 378 U.S. 575; *Reck* v. *Pate,* 367 U.S. 433. By contrast, the Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. To recognize this is no more than to accord those values undiluted respect."

See also *Wilson* v. *Rose* (9th Cir. 1966)—F.2d—, (Footnote 8).

In California, the limiting rules which surrounded the comment rule materially reduced the effect of the comment or instruction on the resolution of the case. Many years ago the California courts curtailed the effect of the comment rule by requiring instructions that defendant's failure to deny or explain evidence against him did not create a presumption of guilt or of the truth of the facts, that the prosecution was not relieved from its burden of proving every essential element of the crime and the defendant's guilt beyond

a reasonable doubt and that no inference could be drawn if defendant did not harbor the knowledge necessary to explain or deny the evidence against him (*People* v. *Adamson*, 27 Cal.2d 478, 489–493, 165 P.2d 3; CALJIC No. 51 (Rev.); *People* v. *Albertson*, 23 Cal.2d 550, 594–596, 145 P.2d 7 (Traynor, J. concurring); *People* v. *Sawaya*, 46 Cal.App.2d 466, 115 P.2d 1001; 34 Cal.L.Rev. 764; 32 Cal.L.Rev. 317).

Hence respondent submits that in light of the type of constitutional error considered here it is clearly proper that a state's harmless error rule should be applied to evaluate whether this error caused such a denial of due process as would cause state action to run afoul of the Fourteenth Amendment to the United States Constitution.

II. California's Harmless Error Rule Was Properly Applied to the Facts of This Case Where the Evidence of Guilt Was Overwhelming

Although the present case was a circumstantial evidence one, the evidence of the guilt of petitioners was overwhelming. Briefly, the evidence which is set forth at length under the statement of the case shows that petitioners were the last people seen in the bar with the victim; persons resembling the petitioners were seen with the victim who was closing the bar on the night of the murder, that the victim and the place where he tended bar was the subject of a robbery, that the victim's body was found in an open ditch with bullets wounds in the head made by a gun of a caliber

purchased by one petitioner; that blood of the victim's type was in petitioner's car and on their clothes and fibers from the victim's shoes matched those found in the car; that hairs matching those of the victim were found in the car; that red paint on the car's floor mat came from the victim's shoes; that a check signed by Mrs. Chapman bearing a stamp "refer to maker" was by the scene of the body, and that one petitioner (Teale) told a fellow prisoner that the other petitioner (Chapman) committed the murder.

With respect to the application of the California harmless error rule to the comments made by the prosecution in argument (to which no objection was raised at the time of trial) [16] the California Supreme Court stated in its opinion reported at 63 Cal.2d 178, 196–7, 45 Cal.Rptr. 729, 404 P.2d 209:

> "As stated, neither defendant testified in his or her own behalf in the exercise of their constitutional privilege. The prosecuting attorney, during his summation to the jury, commented on numerous occasions regarding the failure of either defendant to explain certain factual matters established by independent evidence. Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the

[16] Admittedly the case was tried prior to *Griffin* and had such objections been made they would probably have been overruled under existing California law.

shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the killing and, generally, the overall commission of the crime. In addition to the foregoing the court, in instructions to the jury and in accordance with the California Constitution provisions (Cal. Const., art. I, § 13), stated, among other things, that the failure of defendants to testify from facts within their knowledge in explanation of incriminating evidence, may be deemed as tending to indicate the truth of such incriminating evidence and 'that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable.'

"The foregoing comments and instructions have been ruled in violation of the Fifth and Fourteenth Amendments (*Griffin* v. *California*, 380 U.S. 609 [85 S.Ct. 1229, 14 L.Ed.2d 106], *Malloy* v. *Hogan*, 378 U.S. 1 [84 S.Ct. 1489, 12 L.Ed.2d 653]), but the question remains whether in any particular instance the error in allowing such comments and in giving such instruction has resulted in a miscarriage of justice requiring a reversal of the judg-

ment of conviction. (*People* v. *Bostick*, 62 Cal.2d 820, 823–827 [44 Cal.Rptr. 649, 402 P.2d 529].)

"It clearly appears that the error in allowing the comments and in giving the improper instruction could not have resulted in a miscarriage of justice as to the defendant Teale. While he may not have confessed to the crime, nevertheless the admissions which he made to his fellow inmate are so damaging that, when considered with the other substantial evidence, the proof of his guilt must be deemed overwhelming. His statements, of course, were not admissible against the defendant Chapman. Nevertheless the persuasive, circumstantial web of evidence which implicated her was not refuted, and the only real defense which she urged at the trial level was her claimed inability to form a criminal intent, which she sought to establish through expert witnesses. The comments and instruction on her failure to explain away the circumstantial web of evidence become of less significance in view of the defense's complete failure to refute such evidence by any means whatsoever. That evidence, in effect, stands unchallenged and the prosecutor's and court's remarks add little to its stature. Moreover, we are unable to discern what bearing, if any, the remarks would have on the defense of an inability to form the requisite intent, as interposed by Mrs. Chapman. This being a technical defense based upon expert opinion, comments on her failure to testify could not be material thereto. In view of the almost complete failure to submit *any* rebuttal, the comments and instruction added little which was not already apparent to the jurors, that is, the defendants were

not disposed to question the truth of the facts asserted by the prosecution's witnesses.

"We are therefore of the opinion that in the absence of the erroneous comments and instruction a result more favorable to defendants was not reasonably probable in view of the entire record (*People* v. *Watson*, 46 Cal.2d 818, 836 [299 P.2d 243]), and that there has been no miscarriage of justice as to either Mrs. Chapman or Mr. Teale."

By directing the jury's attention to the self-evident facts in the case at bar did the prosecution so materially affect petitioners' rights that a fair trial was denied? It is submitted that the answer is no. The jury was obviously aware of the fact that no explanation had been made of the evidence presented and no refutation of such evidence adduced. Some of this evidence certainly could have been refuted by testimony of and from other individuals than the petitioners themselves if it had not been true. Further, petitioners in accordance with California law were given the full advantage of discovery proceedings which meant they had virtually all of the material sought to be produced by the prosecution available to them prior to trial. The prosecution's case was not dependent upon words elicited from the petitioners' own lips. On the contrary, the prosecution case was developed entirely by independent witnesses and the inferences to be drawn from their testimony. Thus any question of comparison between this type of case and one that is based upon an improperly admitted confession is not correct. It would appear that the majority of the com-

ment complained of went to the strength and weight of the evidence produced by the prosecution and the failure of the defense to produce any evidence contradictory thereto. (*Hood* v. *United States* (10th Cir. 1932) 59 F.2d 153; *United States* v. *Johnson* (4th Cir. 1964) 337 F.2d 180, 203 cert. granted, 379 U.S. 988 and reversed on other grounds, 383 U.S. 169, 15 L.Ed. 2d 681, 86 S.Ct. 749; *State* v. *Perkins* (Mo. 1964) 382 S.W.2d 701, 706).

In other words, is there to be such a thing as permissible "indirect comment" or is even comment generally to be proscribed? (Cf. *Commonwealth* v. *Miller,* 205 Pa. Super. 297, 208 A.2d 867, 869; *Wood* v. *State,* 372 S.W.2d 896 (Tex.Crim.App. 1964); *State* v. *Chasteen,* 228 S.C. 88, 88 S.E.2d 880, 886; *Gargotta* v. *United States* (8th Cir. 1935) 77 F.2d 977; *State.* v. *White,* 247 La. 19, 169 So.2d 894, 901 (1964).)

In determining whether the comment is prejudicial to a defendant even in cases prior to *Griffin* where states by their own statutes or case law had prohibited comment, various tests had been applied. Courts have considered the directness or indirectness of the reference to a defendant's silence, the context in which the comment was made, the effect of any curative instructions, and, most importantly, how clearly the guilt of the defendant was shown (Vol. XL Tulane Law Review pp. 409–418).

As is apparent in the case at bar, the test used by the California courts in determining error is whether in the absence of such error and in the light of the

entire record it is reasonably probable or reasonably possible that a result more favorable to the defendant would be reached. (See cases cited footnote 11 *supra.*)

It should be noted that the permissible comment sanctioned by the California courts at the time in question and before this Court's decision in *Malloy* v. *Hogan, supra,* was extremely limited in scope. If, therefore, the petitioners at that time felt the comment was beyond the scope of the limited comment rule, it would appear an objection certainly should have been raised in the California courts. This they failed to do and in no way sought to urge it as error prior to the decision in *Malloy* v. *Hogan, supra.* Here the limited comment was directed to an evaluation of the prosecution evidence which the petitioners did not explain or deny. While the Constitution does afford to a defendant the right to remain silent, it cannot shield him from the evidence against him or the compulsion which it generates.

Any attempt by petitioners to cast the blame as to petitioner Chapman not taking the stand because of her nervous condition on the delay in the trial is certainly not supported by the record. The majority of the delay was occasioned by the endeavor of the state courts to accord to petitioners the fair and impartial trial to which they were entitled and the further machinations by both petitioners to obtain separate trials. (See footnote 1, *supra.*) The Fifth Amendment was never enacted nor has it been interpreted as a device to shore up the excessively timid and nervous criminal

defendant. It was enacted to protect against and prevent the use of compelled testimony and statements. There was not one of these produced in this trial as clearly appears from the opinion of the California Supreme Court and the further action of the petitioners in at no time seeking to raise such a question in the trial court. As to these points it appears that petitioners' counsel is attempting to smuggle into this proceeding subsidiary questions which were rejected by this Court and he is engaging in the same tactics for which he was taken to task by this Court in *Irvine* v. *California* (1953), 347 U.S. 128, 98 L.Ed. 561, 74 S.Ct. 381.

The prosecutor in the comments set forth at length in petitioners' brief did not tell the jury that they could infer petitioners' guilt from either his or her failure to testify and had this been done, it would have constituted error under prior California law. (*People* v. *MacCagnan,* 129 Cal.App.2d 100, 113–14, 276 P.2d 679, 688).

For example, the comment with relation to the purchase of guns (RT 1808) related to the fact no evidence was produced which showed which gun was purchased first. Independent evidence had been produced that petitioner Chapman had purchased guns in Reno, Nevada, prior to the killing and in fact at the time of his arrest, petitioner Teale had one of those loaded guns upon his person. Could this comment or lack of it change the result of the case? It is apparent that it could not. So too with relation to the com-

ment on the particular type of gun used in the killing (RT 1809). A gun similar to the type purchased was introduced in evidence but the actual gun used in the killing was not found. Evidence was produced that Mrs. Chapman did purchase a gun of that type in Reno prior to the killing. Patently the disposition of this article was within the knowledge of petitioners and if its disposition had been accidental or otherwise evidence could have been introduced to rebut this fact. It can hardly be urged that comments of this type which are addressed to the weight of the prosecution's evidence are to be equated with a presumption of guilt arising from a defendant's failure to testify or a presumption of guilt arising solely from that fact.

Comments as to the factual evidence at the scene of the killing (RT 1822) show that at that time the prosecutor specifically directed the jury's attention to the petitioners' privilege not to testify but that an adverse inference could be drawn from their failure to explain any facts or details within their knowledge.

Comments were made as to the motive of the killing due to the financial distress of the petitioners at that time (RT 1824–1825); the reason for petitioner Chapman buying two guns in Reno (RT 1826–1827); the petitioners' presence at the scene of the robbery (RT 1827–9); the amount of liquor they were consuming that evening (RT 1838); the question as to which of the two petitioners fired the fatal shots (RT 1840–1); the use of the false registration at the motel shortly after the killing (RT 1844–5); the meaning of

the letter written by Mrs. Chapman after the killing (RT 1848–9); the fact that petitioner Teale had a loaded gun with him at the time of his apprehension which was purchased by petitioner Chapman in Reno (RT 1854–5); petitioner Teale's comments to the officers at the time of his apprehension (RT 1855); the position of the victim at the time of the killing (RT 1860–1861); the blood found on the clothing of Mrs. Chapman (RT 1861–1862); the sending of clothing to Mrs. Smith by petitioners (RT 1861–2); which clothing was sent (RT 1863–4); the fact that no different version of the facts had been presented by petitioner Teale (RT 1881); the blue knit dress similar to the one worn by Mrs. Chapman at the time of the killing (RT 1882–3); the story that Mrs. Chapman told the doctor who examined her and that this did not constitute evidence (RT 1883, 1886); her conflicting statements as to her whereabouts at the time of the killing (RT 1889); the difference in statements given to Dr. Scheuerman and Dr. Winkler (RT 2108–2109); the argument between petitioner Teale and petitioner Chapman (RT 2115, 2116); motive for the robbery (RT 2256); who did the shooting (RT 2256–57, 2258–2259); the background of petitioners (RT 2288).

If we assume that no comment had been made in the case at bar would the outcome have been changed? Would not the jury have been faced with exactly the same questions? What evidence disputed the case presented by the prosecution which demonstrated the guilt

of the petitioners beyond a reasonable doubt? There was none.

This was not a case in which the facts were sharply disputed. On the contrary, it was one in which the prosecution bore the entire burden of proof separate and apart from the use of any statements improperly obtained from either petitioner. No statement sought to be complained of now was urged as misconduct by the defense at the time of the trial. Instead opposing counsel sought to explain away the prosecution's evidence; counsel for petitioner Teale on the ground that his connection with the offenses was not proved and counsel for petitioner Chapman on the ground that she was unable to have the necessary intent to commit the crimes charged.

It is apparent as found by the California Supreme Court that the comments above referred to were addressed to the weight and sufficiency of the evidence and imposed upon petitioners no other burden than the uncontradicted evidence of their guilt imposed.

They were not compelled to speak. Their failure to adduce evidence in their behalfs which contradicted that of the prosecution was apparent to the jury. There was no presumption of guilt based upon their failure to take the stand but when the evidence contradictory to that of the prosecution was solely within their knowledge it could be inferred that if such evidence had been produced it would have been adverse to them. Such reasoning was neither new nor novel. The comments addressed to it did not render their trial a farce nor deprive them of an essentially fair

trial which the state courts did accord them. It was not reasonably possible that the comments contributed to their conviction.

Respondent therefore submits that the application of the state harmless error rule to the case at bar was proper and that the judgment in no manner resulted in a denial of due process which infected the proceedings of the state court.

CONCLUSION

It is respectfully submitted that the judgment of the state court should be affirmed.

Respectfully submitted,

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APPENDIX

California Penal Code

§ 654. Acts made punishable by different provisions of this code: [Effect of acquittal or conviction: Punishment substituted on second conviction]. An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven, and six hundred and sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury. [Enacted 1872.]

§ 1239. [Manner of taking appeal: Automatic appeal after judgment of death.] (a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel. [Enacted 1872; Am. Stats. 1907, p. 559; Stats. 1909, p. 1086; Stats. 1917, p. 37; Stats. 1935, p. 1868; Stats. 1939, p. 2800; Stats. 1945, ch. 40, § 9.]

§ 1258. Court to give judgment without regard to technical errors. After hearing the appeal, the court must give judgment without regard to technical errors or defects, or to exceptions, which do not affect the substantial rights of the parties. [Enacted 1872.]

§ 1404. When not material. Neither a departure from the form or mode prescribed by this code in respect to any pleading or proceeding, nor an error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice, in respect to a substantial right. [Enacted 1872.]

CALIFORNIA CONSTITUTION

Article I § 13

§ 13. Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

Article VI § 4½

§ 4½. Reversal for error resulting in miscarriage of justice

Sec. 4½. No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. (Added Oct. 10, 1911; amended Nov. 3, 1914.)

CALIFORNIA JURY INSTRUCTIONS (CALJIC)

No. 51 (Revised)

WHEN ADVERSE INFERENCE MUST BE DRAWN

It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain

such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt.

In deciding whether or not to testify, the defendant may choose to rely on the state of the evidence and upon the failure, if any, of the People to prove every essential element of the charge against him, and no lack of testimony on defendant's part will supply a failure of proof by the People so as to support by itself a finding against him on any such essential element.

UNITED STATES JUDICIAL CODE § 269 (40 Stats. 1181)

CHAP. 48—An Act to amend section two hundred and sixty-nine of the Act of March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary."

February 26, 1919. [S. 68.] [Public, No. 281.]

Judicial Code. United States courts.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and sixty-nine of the Act approved March third, nineteen hundred and eleven, entitled "An Act to codify, revise, and amend the laws relating to the judiciary," be, and the same is hereby, amended so as to read as follows:

New trials. Vol. 36, p. 1163, amended.

"SEC. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

Technical errors not affecting substantial rights to be disregarded.

Approved, February 26, 1919.

UNITED STATES CODE

Title 18

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Title 28

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

§ 2111. Harmless error

On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties. Added May 24, 1949, c. 139, § 110, 63 Stat. 105.

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966

No. 95

RUTH ELIZABETH CHAPMAN and THOMAS LEROY TEALE,

Petitioners,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

PETITIONERS' REPLY BRIEF

Come now Ruth Elizabeth Chapman and Thomas LeRoy Teale and in answer to the respondent's brief set forth as follows:

This Court has never held that the violation of a *constitutional right* can be saved by the application of the "harmless error" rule, statute, practice, or State constitutional provision.[1]

Payne v. *Arkansas,* 356 US 560, 2 L.ed.2d 975;
Spano v. *New York,* 360 US 315, 3 L.ed.2d 1265;

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[1] California's constitutional provision is known as Article 4½, Section 6, California Constitution. California also has a constitutional provision against self-incrimination, Article 1, Section 13.

Lynumn v. *Illinois*, 362 US 528, 9 L.ed.2d 922;
Haynes v. *Washington*, 373 US 503, 10 L.ed.2d 513;
Miranda v. *Arizona*, 16 L.ed.2d 694;
Vignera v. *New York*, 16 L.ed.2d 694;
Westover v. *United States*, 16 L.ed.2d 694;
California v. *Stewart*, 16 L.ed.2d 694;
Fahy v. *Connecticut*, 375 US 85, 11 L.ed.2d 171.

This Court has adhered to an unbroken line of decisions which preclude the application of the harmless error rule to the improper admission of statements taken in violation of the constitutional guarantee and privilege against self-incrimination.

Fifth Amendment, United States Constitution;
Fourteenth Amendment, United States Constitution;
Griffin v. *California*, 380 US 609, 14 L.ed.2d 106.

In *Payne* v. *Arkansas*, 356 US 560, 2 L.ed.2d 975, the Court said:

> "Respondent suggests that, apart from the confession, there was adequate evidence before the jury to sustain the verdict. But where, as here, a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession. And in these circumstances this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.

"The amended facts, set out above, make applicable the conclusion reached in Chambers v. Florida, 309 US 227, 241, 84 L.ed. 716, 60 S.Ct. 472: 'Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death.' The judgment must be reversed because of the admission in evidence of the coerced confession. . . .

"The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

In *Spano* v. *New York*, 360 US 315, 3 L.ed.2d 1265, at 1272, this Court said:

"The State suggests, however, that we are not free to reverse this conviction, since there is sufficient other evidence in the record from which the jury might have found guilt, relying on Stein v. New York, 346 US 156, 97 L.ed. 1522, 73 S.Ct. 1077. But Payne v. Arkansas, 356 US 560, 568, 2 L.ed.2d 975, 981, 78 S.Ct. 844, authoritatively establishes that Stein did not hold that a conviction may be sustained on the basis of other evidence if a confession found to be involuntary by this Court was used, even though limiting instructions were given. Stein held only that when a confession is not found by this Court to be involuntary, this Court will not reverse on the ground that the jury might have found it involuntary and might have relied on it. The judgment must be

"Reversed."

In *Lynumn* v. *Illinois*, 372 US 528, 9 L.ed.2d 922, at 928, the Court said:

"While this statement is not free from ambiguity, we take it to express the view that even if the testimony as to the petitioner's confession was erroneously admitted, the error *was a harmless one* in the light of other evidence of the petitioner's guilt. That is an impermissible doctrine. As was said in Payne v. Arkansas, 'this Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment because it violates the Due Process Clause of the Fourteenth Amendment.' 356 US 560, at 568, 2 L.ed.2d 975, 981, 78 S.Ct. 844. See Spano v. New York, 360 US 315, 324, 3 L.ed.2d 1265, 1272, 79 S.Ct. 1202; Watts v. Indiana, 338 U.S. 49, 50, note 2, 93 L.ed. 1801, 1804, 69 S.Ct. 1347; Haley v. Ohio, 332 U.S. 596, 599, 92 L.ed. 224, 228, 68 S.Ct. 302.

"The judgment is set aside, and the case is remanded to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion." (Emphasis added.)

In *Haynes* v. *Washington*, 373 US 503, 10 L.ed.2d 513 at 524, the Court said:

"Of course, we neither express nor suggest a view with regard to the ultimate guilt or innocence of the petitioner here; that is for a jury to decide on a new trial free of constitutional infirmity, which the State is at liberty to order.

"This case illustrates a particular facet of police utilization of improper methods. While history amply

shows that confessions have often been extorted to save law enforcement officials the trouble and effort of obtaining valid and independent evidence, the coercive devices used here were designed to obtain admissions which would incontrovertibly complete a case in which there had already been obtained, by proper investigative efforts, competent evidence sufficient to sustain a conviction. The procedures here are no less constitutionally impermissible, and perhaps more unwarranted because so unnecessary. There is no reasonable or rational basis for claiming that the oppressive and unfair methods utilized were in any way essential to the detection or solution of the crime or to the protection of the public. The claim, so often made in the context of coerced confession cases, that the devices employed by the authorities were requisite to solution of the crime and successful prosecution of the guilty party cannot here be made.

"Official overzealousness of the type which vitiates the petitioner's conviction below has only deleterious effects. . . . "

The effort to have an appellate court justify and declare as fair what the trial court and the prosecutors did foully does not comport with due process of law. Due process, in cases where a jury trial is authorized by the Constitution and statutes, requires guilt or innocence to be established before a jury "free of constitutional infirmity".

Haynes v. *Washington*, 373 US 503, 10 L.ed.2d 513.

This Court stated in *Bram* v. *United States*, 168 US 532, 42 L.ed. 569, re impermissible evidence:

"If found to have been illegally admitted, reversible error will result, since the prosecution cannot on the one hand offer evidence to prove guilt, and which by the very offer is vouched for as tending to that end, and on the other hand for the purpose of avoiding the consequence of the error, caused by its wrongful admission, be heard to assert that the matter offered as a confession was *not prejudicial* because it did not tend to prove guilt." (Emphasis added.)

In *Miller* v. *Territory of Oklahoma,* 149 Fed. 330, the court said:

"The zeal, unrestrained by legal barriers, of some prosecuting attorneys, tempts to an insistence upon the admission of incompetent evidence, or getting before the jury some extraneous facts supposed to be helpful in securing a verdict of guilty, where they have prestige enough to induce the trial court to give them latitude. When the error is exposed on appeal, it is met with the stereotyped argument that it is not apparent it in anywise influenced the minds of the jury. The reply the law makes to such suggestion is: that, after injecting it into the case to influence the jury, the prosecutor ought not to be heard to say, after he has secured a conviction, *it was harmless.* As the appellate court has not insight into the deliberations of the jury-room, the presumption is to be indulged, in favor of the liberty of the citizen, that whatever the prosecutor, against the protest of the defendant, has laid before the jury, helped to make up the weight of the prosecution which resulted in the verdict of guilty." (Emphasis added.)

See also:

People v. *Glass*, 158 Cal. 650, at 659.

The trial of the two defendants together was highly prejudicial.

People v. *Aranda*, 63 Cal.2d 518.

In the *Aranda* case, the court said:

> "To some judges, however, the procedure (joint trials) cannot be justified. It results in serious impairment of the rights of the accused to a fair consideration by an impartial jury of the competent evidence produced against him.' (People v. Fisher, 249 N.Y. 419, 428 [164 N.E. 336, 339] [Lehman, J., dissenting]; see People v. Buckminster, 274 Ill. 435, 446-448 [113 N.E. 713, 715-716]; United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 322 [Frank, J., dissenting].) It is a 'fiction' and a 'naive assumption' about the way juries can function. (See Krulewitch v. United States, 336 US 440, 453 [69 S.Ct. 716, 93 L.Ed. 790] [Jackson, J., concurring]; People v. Chambers, 231 Cal.App.2d 23, 33 [41 Cal.Rptr. 551].) The rule calls upon the jury to perform 'a mental gymnastic which is beyond, not only their powers, but anybody's else,' (Nash v. United States (2d Cir.) 54 F.2d 1006, 1007; see Meltzer, Involuntary Confessions: The Allocation of Responsibility between Judge and Jury, 21 U.Chi.L.Rev. (1954) 317, 326.) Writing for the four dissenters in Delli Paoli v. United States, 352 US 232 [77 S.Ct. 294, 1 L.Ed. 2d 278], Justice Frankfurter stated: 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such

a nonadmissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collocation of words and fails of its purpose as a legal protection to defendants against whom such a declaration should not tell. . . . The Government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' (P. 247.) To these critics, the rule is not basic to our jury system and is not needed to preserve the system. Instead it is a rule that perverts the jury trial since it calls upon ordinary lay people to obey an instruction that every judge realizes cannot be obeyed. It fosters what one scholar refers to as our 'inconsistent attitude' toward juries. We treat them 'at times as a group of low-grade morons and at other times as men endowed with a superhuman ability to control their emotions and intellects.' (Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) p. 105.)

"Whether or not these criticisms of the present rule require its abrogation, a question we consider later herein, they clearly foreclose any assumption that error in admitting a confession that implicates both defendants is rendered harmless to the nonconfessing defendant by an instruction that it should not be considered against him. At best, the rule permitting joint trials in such cases is a compromise between the policies in favor of joint trials and the policies underlying the exclusion of hearsay declarations against one who did not make them. When, however, the confession implicating both defendants is not admissible at all, there

is no longer room for compromise. The risk of prejudicing the nonconfessing defendant can no longer be justified by the need for introducing the confession against the one who made it. Accordingly, we have held that the erroneous admission into evidence of a confession implicating both defendants is not necessarily cured by an instruction that it is to be considered only against the declarant. (People v. Gonzales, 136 Cal. 666, 668-669 [69 P. 487]; see Greenwell v. United States (D.C. Cir.) 336 F.2d 962, 968-969; People v. Donovan, 13 N.Y.2d 148, 151 [243 N.Y.S. 2d 841, 193 N.E.2d 628]; People v. Waterman, 9 N.Y.2d 561, 567 [216 N.Y.S. 2d 70, 175 N.E.2d 445]; compare People v. Rudish, 294 N.Y. 500 [63 N.E.2d 77] with Malinski v. New York, 324 US 401, 410-412 [65 S.Ct. 781, 89 L.Ed. 1029].). . . . (63 Cal.2d at 525-526)

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"It is contended that it is a denial of due process to admit into evidence at a joint trial the confession of one defendant inculpating a codefendant even though the jury is instructed that the confession is not to be considered against the codefendant. In Jackson v. Denno, 378 US 368 [84 S.Ct. 1774, 12 L.Ed.2d 908, 1 ALR 3d 1205], the United States Supreme Court held that a defendant was constitutionally entitled to have a trial judge or possibly a separate jury determine that his confession was voluntary before it was submitted to the trial jury for an assessment of its credibility. The court did not believe that a jury could separate the issue of the voluntariness of an extrajudicial statement from the issue of its truth. 'If there are lingering doubts about the sufficiency of the other evidence, does the jury unconsciously lay them to rest

by resort to the confession? Will uncertainty about the sufficiency of the other evidence to prove guilt beyond a reasonable doubt actually result in acquittal when the jury knows the defendant has given a truthful confession.

"'It is difficult, if not impossible, to prove that a confession which a jury has found to be involuntary has nevertheless influenced the verdict or that its finding of voluntariness, if this is the course it took, was affected by other evidence showing the confession was true.' (Pp. 388-389.) It quoted from Justice Frankfurter's dissent in Delli Paoli to the effect that a jury should not be permitted to be influenced by evidence against a defendant that as a matter of law they cannot consider but as a matter of fact they cannot disregard, and cited Morgan, Some Problems of Proof under the Anglo-American System of Litigation (1956) pages 104-105, to the same effect.

"Although Jackson was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.'

"[1] 'Because of these close parallels between Jackson and Delli Paoli, Jackson may foreshadow a holding that the Delli Paoli procedure violates due process.' (78 Harv. L. Rev. 211, 213; see People v. Clark, 62 Cal.2d 870, 885, fn. 13 [44 Cal. Rptr. 784, 402 P.2d 856].)'"

"Indeed, the latter task may be an even more difficult one for the jury to perform than the former. Under the New York procedure, which Jackson held violated due process, the jury was only required to disregard a confession it found to be involuntary. If it made such a finding, then the confession was presumably out of the case. In Joint trials, however, when the admissible confession of one defendant inculpates another defendant, the confession is never deleted from the case and the jury is expected to perform the overwhelming task of considering it in determining the guilt or innocence of the declarant and then of ignoring it in determining the guilt or innocence of any codefendants of the declarant. A jury cannot 'segregate evidence into separate intellectual boxes.' (People v. Chambers, 231 Cal.App.2d 23, 33 [41 Cal.Rptr. 551].) It cannot determine that a confession is true insofar as it admits that A has committed criminal acts with B and at the same time effectively ignore the inevitable conclusion that B has committed those same criminal acts with A." (63 Cal.2d 528-529)

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"'[I]n criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend.' (United States v. Delli Paoli (2d Cir.) 229 F.2d 319, 323 [Frank, J., dissenting].) In the absence, however, of a holding by the United States Supreme Court that the due process clause requires such change, the rules we now adopt are to be regarded, not as constitutionally compelled, but as judicially declared rules of practice to implement section 1098." (63 Cal.2d 530)

Actually, the defenses were in complete conflict in that Mr. Teale refused to admit, even to his counsel, any participation in the crimes, whereas Mrs. Chapman admitted to the officers and doctors that she was with Mr. Teale when he committed the crimes but did not voluntarily participate therein. The case is actually very weak against Mrs. Chapman and there was a serious dispute as to her ability to have a specific intent at the time of the crime.

The Error Was Not Harmless Where the Evidence of Mrs. Chapman's Guilt Was Based Solely on Inferences and Comment of the Prosecutor as to the Silence of the Defendants Was Used to Supplant Evidence.

Respondent states: "Although the present case was a circumstantial evidence one, the evidence of the guilt of Petitioners was overwhelming." (Resp. Brief, p. 25).

However, in analyzing the evidence presented against Mrs. Chapman, it is clear that the evidence was so insufficient that any error was prejudicial, particularly the comments of the prosecutor and the court's instructions.

The jury should consider the case against each defendant separately and only consider the evidence *admitted against a particular defendant* in determining that defendant's guilt on each charge. Also, that evidence admitted only against one defendant could not be considered against the other defendant. Despite this fact, the Attorney General in its Respondent's Brief and the California Supreme Court in its Opinion linked all the evidence admitted against either defendant in an attempt to establish the corpus delicti of the *crimes of robbery, kidnaping and murder.* This was buttressed by comment and argument regarding

the failure of defendants to testify. Eliminating all evidence that had been admitted into evidence only against the codefendant Teale and the illegal comment, it is impossible for the respondent to search the record and show even the corpus delicti of any of the alleged crimes as against Mrs. Chapman—let alone to show that the evidence was so "overwhelming" that any error against her would not be prejudicial.

None of These Elements Was Proved Regarding Mrs. Chapman:

A. ROBBERY is defined in the California Penal Code, Section 211, as follows:

> "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

Mrs. Chapman was convicted of robbery that was alleged to have taken place in San Joaquin County. (See Count One of indictment) The only evidence on this phase of the case was the testimony of witness Lawrence Niland, the owner of the Spot Club. (R.T. 971) He testified that he went to the Spot Club about nine o'clock on the morning of October 18, 1962 (R.T. 984); that he observed a cash drawer on top of the bar when he entered. (R.T. 985) However, the safe was unlocked with around four hundred dollars in it. (R.T. 986) He testified that from his examination of the tape he determined that he was short about $260. (R.T. 998)

These are the circumstances that the prosecution relied upon to draw the *inference* that the $260 was taken from the

person or immediate presence of Billy Dean Adcock, against his will, and by means of force or fear.

The evidence is insufficient as a matter of law to show any participation by Mrs. Chapman in the taking of the $260 from the decedent, "accomplished by means of force or fear". With nothing but an inference that the money had been taken from the establishment by means of force and fear, and second, the inference that Mrs. Chapman participated in said taking, the trial court instructed the jury that because Mrs. Chapman failed to testify "That among the inferences that may reasonably be drawn therefrom, those unfavorable to the Defendant are the more probable". (R.T. 2163)

B. KIDNAPING. The crime of kidnaping, under California law, is the *forcible* abduction of another person. (Penal Code, Section 207) The evidence in the case before the bar is totally devoid of any evidence of a *forcible* abduction. The only evidence of the circumstances under which the victim left the bar was the testimony of witness Montalvo. (R.T. 884-894) He testified as follows:

> "Well, I was coming by and slowing down for the light, I looked over to the—to the Spot Club and there was three—three persons there, and the bartender—the big fellow, the bartender, he was—looked like he was closing the door, and there was a fellow behind him and a woman was walking away about six feet away, and that's all I seen. I just—when the light changed, I kept on going." (R.T. 887)

This witness further testified that the bartender appeared to be locking the door (R.T. 888) and that he would not recognize the man or woman with the bartender. (R.T. 891)

No other evidence was presented to explain the circumstances under which the alleged victim left the Spot Club. Obviously, the relevance of the above testimony was for the jury to draw an *inference* of kidnaping by the defendants.

Again, there is nothing but an inference based upon an inference against Mrs. Chapman. First, from the above evidence, an inference must be made that there was a *forcible* abduction. (California Penal Code, Section 207) Second, the inference that Mrs. Chapman participated in said forcible abduction. And then there was the prejudicial argument of the prosecutor and the court's instructions.

C. MURDER OF THE FIRST DEGREE. The victim (Billy Dean Adcock) was found dead in Sacramento County. (R.T. 922) He had last been seen alive at the Spot Club in San Joaquin County. (R.T. 887) The defendants had been acquitted of the charge of kidnaping Mr. Adcock for the purpose of robbery (the original charge) by their finding of guilty on the included offense of simple kidnaping. Thus we have a homicide in a different county than the robbery charge that defendants were convicted of, under unexplained circumstances. Again, nothing but speculation and inferences can connect Mrs. Chapman with this crime or the specific intent that was an element of the corpus delicti of first degree murder. Thus, the continual demand by the prosecution that the jury draw an adverse inference against Mrs. Chapman because of her failure to testify, and the trial court's instruction to the same effect, was highly prejudicial.

Respondent stated:

> "What evidence disputed the case presented by the prosecution which demonstrated the guilt of the Peti-

tioners beyond a reasonable doubt? There was none. This was not a case in which the facts were sharply disputed." (Respondent's Brief, pp. 38-39)

This statement reflects the respondent's continuous efforts to condemn the petitioners jointly rather than individually and overlook the fact that on January 29, 1963, the Public Defender presented a motion to withdraw as counsel for petitioner Chapman on the grounds of a *conflict of interest* between her and petitioner Teale, which was granted. (C.T. 4, 7A, 8A)

No percipient witness testified to any active or actual participation by Ruth Elizabeth Chapman to the crimes of robbery, kidnaping or murder. It was an essential part of the corpus delicti of the crime alleged against Mrs. Chapman that any acts or participation of hers be done with a particular or specific intent. No direct or circumstantial evidence was introduced to base a finding of a particular or specific intent of Mrs. Chapman at the time of the crimes in question. *Both* prosecution and defense experts agreed that following the crimes in question, Mrs. Chapman had suffered amnesia. (R.T. 1579; 1780) With this state of the record, it is manifest that *any error* would be prejudicial. Mrs. Chapman's state of mind at the time of the alleged crimes could only be determined by the jury by *inferences*. With the role of an inference thus playing such a vital part in the decision, the court then instructed the jury from her failure to testify "that among the *inferences* that may reasonably be drawn therefrom, those unfavorable to the defendant are the more probable." (Emphasis added) (R.T. 2163) This instruction directly violated the constitutional rule of *Griffin* v. *California*, 380 US 609, under circumstances that cannot be held harmless.

The respondent's statement that there was no evidence presented that disputed the case presented by the prosecution is untrue as to Mrs. Chapman. There was a sharp dispute concerning her defense of lack of ability to have a specific intent.

Dr. Arnold Sheuerman, a psychiatrist, had testified on behalf of Mrs. Chapman that in his opinion Mrs. Chapman had an amnesic episode that occurred after she received a beating from the codefendant Teale, and *before* any of the crimes in question. (R.T. 1657-1658)

Dr. Ralph K. Winkler, a psychiatrist, testifying for the prosecution, agreed that Mrs. Chapman suffered an amnesic episode but gave his opinion that it occurred *after* the crimes in question and thus she was capable of forming a specific criminal intent. (R.T. 1771)

The question concerning Mrs. Chapman's ability to form a criminal intent had to hinge on when the amnesia occurred, which amnesia both the State and defense established *had occurred.*

Here there was nothing but an *inference* that Mrs. Chapman, because she was with the codefendant, participated in the alleged crimes. What other proof is there of her state of mind at the time of the acts in question? Immediately prior to the crimes, the last two witnesses who saw Mrs. Chapman stated that she was intoxicated, appeared to have been crying, and couldn't coordinate when she attempted to dance. (R.T. 854; 855; 861; 862; 868; 874; 875)

The court then instructed the jury that because Mrs. Chapman failed to testify, "that among the inferences that may reasonably be drawn therefrom, those *unfavorable* to

the defendant are the more probable." (Emphasis added) (R.T. 2163)

This instruction went to the very heart of Mrs. Chapman's defense of inability to form a criminal intent and was exceedingly harmful.

If we were to paraphrase the language of Justice Field in *Wilson* v. *United States,* 149 US 60, 70, substituting in the place of the words "this statute" the words "the rule of *Griffin* v. *California*", it would be stated as follows:

> "We do not see how the rule of Griffin v. California can be completely enforced, unless it be adopted as a rule of practice that such improper and forbidden reference by counsel for the prosecution shall be regarded as good ground for a new trial in all cases where the proof of guilt are not so clear and conclusive that the court can say affirmatively the accused could not have been harmed from that cause."

The proof of guilt of Mrs. Chapman is not so clear and conclusive that the court can say affirmatively that she could not have been harmed by the multitudinous comments of the prosecuting attorneys on her failure to testify, plus the trial court's erroneous instruction that unfavorable inferences could be drawn by the jury from her failure to testify to facts within her knowledge.

In *Stewart* v. *United States,* 366 US 1, at the defendant's third trial the defendant testified for the first time and was asked on cross-examination, "This is the first time you have gone on the stand, isn't it?" On certiorari, the Supreme Court of the United States reversed the conviction, holding (1) the question was improper and (2) prejudicial

rather than harmless error resulted from the asking of the question.

The Record Supports Fact That Mrs. Chapman Failed to Testify Because of Her Physical Condition, in Addition to Her Constitutional Right to Remain Absolutely Silent Without That Silence Being Used as Evidence Against Her.

Respondent has stated:

> "Any attempt by Petitioners to cast the blame as to Petitioner Chapman not taking the stand because of her nervous condition on the delay in the trial is certainly not supported by the record." (Respondent's Brief, p. 35)

On the contrary, the record shows that Mrs. Chapman made every possible effort to be granted a speedy (and separate) trial but was denied such constitutional right for the sole purpose of forcing and having a joint trial with her codefendant. (For history of said effort by Mrs. Chapman, see Appendix A hereof)

Mrs. Chapman's trial was delayed until five months and twenty-one days after her arrest for the sole purpose of having a joint trial with her codefendant. Her motion for a separate trial was denied, as were her motions for a speedy trial and motion to dismiss on grounds of unconstitutional delay. At none of these motions did the prosecution urge any cause other than its asserted right to proceed against both defendants jointly. (R.T. 104A) The prosecution offered no factual reason why such a joint trial was either necessary or convenient.

The delay was prejudicial to Mrs. Chapman because it contributed to her collapse and inability to testify, which failure to testify was commented on extensively. In this regard, Mrs. Chapman submitted an affidavit in support of her demand for immediate trial that stated:

> "That I have previously suffered from a nervous breakdown and am presently in a very nervous condition; that I have been under arrest and confined continuously for a period of 158 days. *That I believe that a further delay in my trial will be detrimental to my health and may well result in my having a relapse from my previous breakdown.*
>
> "Wherefore, the undersigned respectfully demands that this court issue its order for an immediate trial for this defendant, or, in the alternative, that Information No. 15779 be dismissed as to this defendant.
>
> "Dated: March 28th, 1963.
>
> "/s/ Ruth Elizabeth Chapman
> "Affiant" (Emphasis added)
> (C.T. 86-87)

Although Mrs. Chapman was in jail and subject to examination by the prosecution's doctors, no counter affidavit was filed. The motion for immediate trial, or, in the alternative, motion to dismiss for failure to bring case to trial was denied. (C.T. 93) Thus, both the prosecution and trial court had knowledge of Mrs. Chapman's physical condition and that further delays in her trial would prejudice her ability to aid in her defense. Mrs. Chapman stated in her affidavit (two months prior to the start of trial) "That this defendant intends to testify at her trial". (C.T.

31) The probation report, in giving Mrs. Chapman's version, stated:

> "She expressed the feeling that if her emotional collapse and the need of tranquilizers had not interfered with her taking the stand and giving the foregoing versions, the verdict might have been different as to her." (C.T. 329)

The collapse that the probation report referred to occurred twenty-two days after the trial commenced. (R.T. 1733) This was eighty-two days after her affidavit stating she intended to testify at her trial and 194 days after her arrest.

With full knowledge by the trial court and the prosecution of the foregoing facts, as distinguished from the jury, who did not have such knowledge, the prosecution then stated and re-stated to the jury that they *should* draw adverse inferences against Mrs. Chapman because she didn't testify but could have.

> "Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom *will be* an adverse inference under the circumstances, and under the instructions of the Court." (Emphasis added) (R.T. 1827)

The record supports the fact that Mrs. Chapman resisted delays in her trial and informed the court that such delays would be detrimental to her health. The trial was delayed several months and Mrs. Chapman did collapse

during the trial. The prejudice of the delay was compounded by the prosecution, who was responsible for the delays, in then arguing vehemently about Mrs. Chapman not taking the stand.

> " . . . you have heard much about lawyers being referred to as 'mouthpieces' . . . I think you have seen a demonstration here . . . because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson, a 'mouthpiece.'" (R.T. 2109)

The Prejudice to Mr. Teale of a Joint Trial, and His Silence as "Evidence."

Mr. Teale was likewise prejudiced by the testimony with reference to Mrs. Chapman and her alleged admissions that she was with Teale when he allegedly committed the crimes. His silence, commented upon as proof of guilt, necessarily weighed heavily against him and was highly prejudicial "silent evidence" in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

Griffin v. *California*, 380 US 609;
Malloy v. *Hogan*, 378 US 1.

Evidence of prejudice to Mr. Teale is the reading of the statements of Ruth Chapman to Dr. Arnold Sheuerman:

> "'It was such a shock when Tommy beat me up.' Now, he says, 'Then she went on to describe how they had driven from Croce's a short way, she doesn't know how long, he had told her to stop, that we'll go in and get a beer. She tried to resist because of her appearance, of her fatigue, of her intoxication. He insisted.

"I did what I was told." He went in the bar, he ordered two beers, she was quite upset, he insisted, and then he said, "I love you very much," and she said to me in the examination, "I melted. I was so loaded I could hardly stand up. Besides, I was beat up, he wanted to dance, I tried to, I was afraid to provoke him. There were two other couples in the bar. They left." She looked in her purse—there is some question about whether or not this was her purse—there is some question about whether or not this was her purse or not or a mistaken purse—she looked for a cigarette, and heard the comment, "Get your hands up," looked up, saw a gun in Mr. Teale's hand, just stood there, he told her to lock the door, she went over to do it, couldn't find the lock.' Now, ladies and gentlemen, that corridor is thirty feet long. Nobody in the world except these two persons are able to say what had happened in there. Why should she say that she had gone clear to that door at his command to try to lock it? Why should she try to put herself in that position, unless she is trying to cooperate and tell the truth. Because of the very comment the doctor made, 'I asked her at that point'—and she is the one that is telling it, telling the good with the bad, everything that she can to him —'I asked her at that point why she didn't go out of the door, why she didn't get out, and she said, "I don't know, I couldn't think, it was just like I was in a trance or a nightmare."'" (R.T. 2040-2041)

The jury again asked to have Dr. Sheuerman's testimony read. (R.T. 2182, et seq.)

Where There Is a Violation of the Rule of Griffin v. California, 380 US 609, Can the Error Be Held to Be Harmless?

On April 28, 1965, *Griffin* v. *California* held that the Fifth Amendment "in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence . . . " (380 US at 615, 14 L.ed.2d at 110)

The question is now asked: "Where there is a violation of the rule of *Griffin* v. *California,* can the error be held to be harmless?" To answer this question, we must look to the purposes of the *Griffin* rule.

> " . . . the 'purpose' of the Griffin rule is to be found in the whole complex of values that the privilege against self-incrimination itself represents, values described in the Malloy case as reflecting 'recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. . . . ' "
>
> " . . . the basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather *to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load.'* " (*Tehan* v. *Shott,* 15 L.ed.2d 458-459) (Emphasis added)

Thus, if "even the guilty are not to be convicted unless the prosecution shoulder the entire load", it follows that a violation of this basic purpose cannot be held to be harmless. The application of the *Griffin* rule should be the

same as the application of the rule governing involuntary confessions.

> "Without regard for the truth or falsity of a confession, and *even though there is ample evidence aside from the confession to support conviction,* a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession." (*Jackson* v. *Denno,* 378 US 368, 12 L.ed.2d 908, headnote 3) (Emphasis added)
>
> "Due process, guaranteed by the Fourteenth Amendment, is denied an accused where he is deprived of that fundamental fairness which is essential to the very concept of Justice." (*Payne* v. *Arkansas,* 356 US 560, 2 L.ed.2d 975, headnote 7)

Rogers v. *Richmond,* 365 US 534, 5 L.ed.2d 760, states:

> "The constitutional principle of excluding involuntary confessions does not rest upon their nature as untrustworthy, but upon the principle that the state must establish guilt by evidence independently and freely secured, and may not by coercion prove its charge against an accused out of his own mouth." (Headnote 3)
>
> "A defendant in a state criminal trial has the right to be tried according to the substantive and procedural due process requirements of the Fourteenth Amendment." (Headnote 7)

It is further stated in *Rogers* v. *Richmond,* 5 L.ed.2d 760, at 769:

"To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension."

To the extent that in the trial of petitioners, argument and instructions were given the jury on the basis of standards that departed from constitutional requirements, to that extent petitioners were unconstitutionally tried and their convictions should be vitiated by error of constitutional dimension.

Mr. Justice Harlan, in *Twining* v. *New Jersey*, 211 US at 121, 53 L.ed. at 115, said:

"By the Fifth Amendment, as already stated, it was expressly declared that no one should be compelled, in a criminal case, to be a witness against himself. Those Amendments being adopted by the nation, the people no longer feared that the United States or any Federal agency could exert power that was inconsistent with the fundamental rights recognized in those Amendments. It is to be observed that the Amendments introduced no principle not already familiar to liberty-loving people. They only put in the form of constitutional sanction, as barriers against oppression, the principles which the people of the colonies, with entire unanimity, deemed vital to their safety and freedom. • • •

"It is my opinion, also, that the right to immunity from self-incrimination cannot be taken away by any state consistently with the clause of the Fourteenth

Amendment that relates to the deprivation by the state of life or liberty without due process of law." (53 L.ed. at 117)

Mr. Justice Harlan pointed out that the view is supported by what Mr. Justice Miller said for the court in *Davidson* v. *New Orleans,* 96 US 97, 101, 102, 24 L.ed. 616, 618, 619, in which the guarantees of personal rights included "protection 'against the accused being compelled, in a criminal case, to testify against himself.'"

In *Malloy* v. *Hogan,* 378 US 1, 12 L.ed.2d 653, the court states:

"The marked shift to the federal standard in state cases began with Lisenba v. California, 314 US 219, 86 L.ed. 166, 62 S.Ct. 280, where the Court spoke of the accused's 'free choice to admit, to deny, or *to refuse to answer.*' Id., at 241, 86 L.ed. at 182. See Ashcraft v. Tennessee, 322 US 143, 88 L.ed. 1192, 64 S.Ct. 921; Malinski v. New York, 324 US 401, 89 L.ed. 1029, 65 S.Ct. 781; Spano v. New York, 360 US 315, 3 L.ed.2d 1265; Lynumn v. Illinois, 372 US 528, 9 L.ed.2d 922, 83 S.Ct. 917; Haynes v. Washington, 373 US 503, 10 L.ed.2d 513, 83 S.Ct. 1336. The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. Rogers v. Richmond, 365 US 534, 541, 5 L.ed.2d 760, 766, 81 S.Ct. 735. Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment pro-

hibits the States from inducing a person to confess through 'sympathy falsely aroused,' Spano v. New York, supra, 360 US at 323, 3 L.ed.2d at 1272, or other like inducement far short of 'compulsion by torture,' Haynes v. Washington, supra, it follows a fortiori that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement —the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence."

The Court stated in *Murphy* v. *Waterfront Commission of New York*, 378 US 52, 12 L.ed.2d 678, at 681:

"It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of fair play which dictates 'a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load,' 8 Wigmore, Evidence (McNaughton rev, 1961), 317; our respect for the inviolability of the human personality and of the right of each individual 'to a private enclave where he may lead a private life,' United States

v. Grunewald, 233 F.2d 556, 581, 582 (Frank, J., dissenting), revd 353 US 391, 1 L.ed. 2d 931, 77 S.Ct. 963; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes 'a shelter to the guilty,' is often 'a protection to the innocent.' Quinn v. United States, 349 US 155, 162, 99 L.ed. 964, 972, 75 S.Ct. 668, 51 ALR 2d 1157.

"Most, if not all, of these policies and purposes are defeated when a witness 'can be whipsawed into incriminating himself under both state and federal law even though' the constitutional privilege against self-incrimination is applicable to each."

The State of California is not willing to accept the plain wording of the Fifth and Fourteenth Amendments. They would add words not in the Constitution, to-wit: "if not prejudicial". But the Fifth and Fourteenth Amendments forbid any use of self-incriminating evidence—*Nemo tenetur seipsum accusare,* no one is bound to accuse himself.

WHEREFORE, petitioners pray for reversal of the judgments below.

Respectfully submitted,

MORRIS LAVINE
Attorney for Petitioners

APPENDIX A

History of Trial Delay

FEBRUARY 5, 1963

Mrs. Chapman's trial counsel was appointed to represent her. (C.T. 5)

FEBRUARY 14, 1963

Mrs. Chapman filed a Motion for Order for Separate Trial, Notice of Hearing Motion for Separate Trial, and Affidavit of Defendant, Ruth Elizabeth Chapman, in Support of Motion for Separate Trial. (C.T. 29-37)

FEBRUARY 21, 1963

The Motion for Separate Trial was denied. (C.T. 29-37)

Mrs. Chapman filed Motion for Dismissal for Failure to Bring Case to Trial (C.T. 51-52); Motion of Hearing for Dismissal (C.T. 53-54); Affidavit of Defendant, Ruth Elizabeth Chapman In Support Of Motion For Dismissal (C.T. 48-50); and Memorandum of Points and Authorities In Support Of Defendant's Motion to Dismiss The Indictment. (C.T. 43-47)

FEBRUARY 26, 1963

Mrs. Chapman filed a Supplementary Affidavit Of Defendant, Ruth Elizabeth Chapman, In Support Of Motion For Dismissal. (C.T. 56-59)

Mrs. Chapman's Motion For Dismissal Of The Indictment, upon the ground of a denial of a speedy trial, was denied. (C.T. 61)

MARCH 4, 1963

Counsel for codefendant Teale filed a motion for a thirty day continuance on the ground that he did not

have adequate time to prepare for the trial. (C.T. 76) Mrs. Chapman resisted any continuance. (R.T. 104A-111A) The motion for continuance was granted and the trial date was set for April 16, 1963. (C.T. 79)

MARCH 6, 1963

Mrs. Chapman filed a Petition for a Writ of Mandate with the District Court of Appeal for the State of California in and for the Third Appellate District to compel the Superior Court of the State of California, in and for the County of San Joaquin, to proceed with the trial against Mrs. Chapman on the previously set date of March 19, 1963.

MARCH 14, 1963

Said petition was summarily denied. (C.T. 458)

MARCH 28, 1963

Mrs. Chapman filed Demand For Immediate Trial, Or, In The Alternative, Motion To Dismiss For Failure To Bring Case To Trial (C.T. 88-89; Notice Of Hearing Demand For Immediate Trial, Or, In The Alternative, Motion To Dismiss For Failure To Bring Case To Trial (C.T. 90-91); Affidavit In Support Of Demand For Immediate Trial (C.T. 86-87); and Memorandum Of Points And Authorities In Support Of Defendant's Demand For Immediate Trial, Or, In The Alternative, Motion To Dismiss For Failure To Bring Case To Trial.

The affidavit filed by Mrs. Chapman stated: "That I am one of the defendants in the above entitled action.

"That I was arrested on October 26, 1962, in St. Joseph, Missouri, and voluntarily waived extradition hearings so that I could return to the State of California for a speedy trial.

"That I am completely and entirely innocent of all the crimes alleged against me and my only capacity was that of an unwilling witness; that I have cooperated with the authorities in every way asked of me so that I might be given a speedy trial.

"That I have never requested a delay, but, on the contrary, have continually asked for a speedy trial.

"That I have previously suffered from a nervous breakdown and am presently in a very nervous condition; that I have been under arrest and confined continuously for a period of 158 days; *that I believe that a further delay in my trial will be detrimental to my health* and may well result in my having a relapse from my previous breakdown.

"Therefore, the undersigned respectfully demands that this Court issue its order for an immediate trial for this defendant, or, in the alternative, that Information No. 15779 be dismissed as to this defendant. (Emphasis added)

"Dated: March 28th, 1963.

"Ruth Elizabeth Chapman
"Ruth Elizabeth Chapman,
Affiant"

(C.T. 86-87)

APRIL 2, 1963

Mrs. Chapman's Demand For Immediate Trial, Or, In The Alternative, Motion To Dismiss For Failure to Bring Case To Trial was denied. (C.T. 93)

Mrs. Chapman filed a Petition for Writ of Prohibition in the District Court of Appeal in the State of California, in and for the Third Appellate District. (C.T. 394-432)

APRIL 4, 1963

Said petition was summarily denied. (C.T. 459)

APRIL 16, 1963

The selection of the jury began. (C.T. 94)

MAY 7, 1963

Mrs. Chapman collapsed in court. (R.T. 1733)

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

No. 95

RUTH ELIZABETH CHAPMAN and
THOMAS LeROY TEALE,
Petitioners,

v.

THE PEOPLE OF THE STATE OF
CALIFORNIA,
Respondent.

On Writ of Certiorari to the Supreme Court
of the State of California

RESPONDENT'S PETITION FOR REHEARING

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

RESPONDENT'S PETITION FOR REHEARING

Respondent, State of California, prays that this Court grant a rehearing of its judgment issued February 20, 1967, reversing the judgment of the California Supreme Court.

REASONS FOR GRANTING A REHEARING

1. This Court, in reversing the judgment of the California Supreme Court for applying California's harmless error rule to a *Griffin* violation, promulgated a new and novel harmless error rule which it stated is to be applied to federal constitutional errors. In so

doing this Court has cast aside the various harmless error rules hitherto adopted by some fifty states as well as the federal government. These rules through some fifty years of interpretations have had settled meanings. They could be applied by the respective courts within their respective jurisdictions in a harmonious manner. The adoption of this new rule by this Court introduces a new concept into harmless error rules. One which is unknown and untried on an appellate level, namely, a concept of "reasonable doubt."

This concept as stated in the majority opinion is that the "beneficiary of a constitutional error" is required "to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (Slip Opinion, p. 6.) It is then stated (Slip Opinion, pp. 6–7):

> "We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case."

Is this concept in effect not a reversible error per se rule which the court states it specifically rejects?[1]

[1] See *Phillips* v. *California*, 684 Misc., O.T. 1966, 35 U.S. Law Week 3304 (Decided 2-27-67).

This court is not granting to the highest state courts the right to exercise their judgment on the effect of the error complained of on the case as a whole or even as would appear from the *Phillips* case pursuant to this new rule. A mistrust of state courts and their interpretation of this Court's decisions is displayed. This Court is seeking to preclude them from exercising their discretion in the light of the entire case before them to determine the impact of the error on the entire case.

California courts which have hitherto been in the forefront of progress in the administration of criminal justice have not tried to avoid the responsibilities of "new constitutional rights." On the contrary in certain instances they have accorded to defendants in criminal cases greater protections than those afforded by this Court (Cf. *People* v. *Cahan,* 44 Cal.2d 434, 282 P.2d 905; *People* v. *Dorado,* 62 Cal.2d 338, 398 P.2d 361; *People* v. *Aranda,* 63 Cal.2d 518, 407 P.2d 265). On this very question, a consideration of a *Griffin* error, California courts have demonstrated that they have applied their harmless error rule in a discretionary manner based upon the impact of the error on the entire case (Cf. pp. 24–25, fns. 12, 13, Respondent's Brief).

This new court-adopted rule placing the burden on the beneficiary of the error to display that the error was "harmless beyond a reasonable doubt" interjects a different element into appellate cases.

Reasonable doubt as defined in section 1096 of the California Penal Code is as follows:

> "'. . . It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'"

Other states have other ways of expressing this concept of reasonable doubt. State courts cannot know whether their established concept is the one that this Court views as inherent in its language. Again, although it would appear we are engaged in a question of semantics, nevertheless are we not engendering more confusion instead of clarity into the field of criminal law?

This new rule substitutes a subjective standard for an objective standard which in its various forms has withstood the test of time for some fifty years throughout the nation. In the federal-state systems of courts will the purported beneficiary of such a new harmless error test ever be able to meet this standard. Can a state convince the multitude of judges to whom a defendant may individually resort for relief that any error would not beyond a reasonable doubt have contributed to the verdict? In the absence of such a belief, under this Court's new rule, it would be the duty

and obligation of the judge confronted with such a case, regardless of the entire case, to reverse or to grant the relief sought. This rule differs in minute degree, if at all, from a per se reversible error rule which this Court definitely rejected in the case at bar.

To comply with this new rule, state courts must find that the state has demonstrated beyond a reasonable doubt that the error complained of did not contribute to the conviction. In virtually every case each piece of evidence introduced at a trial or every statement made or instruction given by a trial judge in some manner contributes to the result. Thus can it ever be said that a particular act, later held to be erroneous, could not beyond a reasonable doubt have contributed to the result.

There is no question but that the rule as adopted by this Court will impede the administration of justice. Appellate courts will find themselves in the position of having to apply one test for federal constitutional errors and another test for state constitutional or procedural errors. The application of such double tests for each case will not encourage the speedy administration of justice. This will be contrary to the recommendations and tenor of the report by the President's Commission on Law Enforcement and Administration of Justice (Feb. 1967) which is to encourage the speedy administration of justice (pp. 155, 306, The Challenge of Crime in a Free Society).

Hence it is submitted that this Court should reconsider and grant a rehearing in this case to obviate the

problems presented to all state and federal courts by this newly adopted rule.

2. The adoption of the new rule was not constitutionally compelled and in fact the new rule enunciated by this Court is at variance with the specific rule on harmless error hitherto enacted by Congress and reflected in 28 U.S.C. § 2111 with reference to the federal appellate courts. This Court is familiar with and has fully considered the reason for the adoption of the rule in *Kotteakos* v. *United States*, 328 U.S. 750.

As recognized by the dissenting opinion of Mr. Justice Harlan in the present case, the harmless error rule was not designed to safeguard particular constitutional rights but the fundamental integrity of the judicial proceedings as a whole (Slip Opinion, dissenting opinion of Mr. Justice Harlan, p. 5). By the adoption of this new rule, this Court has signaled out particular types of error which are to be governed by federal standards only and to which state rules cannot properly be applied. It has ignored the affect of such errors on the case as a whole but has limited the particular application of the rule to certain types of errors. This is not accomplishing the end sought by the court in protecting the rights of the defendants from state intrusion. A defendant may be harmed more by a violation of a state rule than a violation of an alleged constitutional right; nevertheless, a far different standard is to be applied to such cases. The question of which federal constitutional rights are involved and what they are in light of changing interpretations is an unsettled area which this rule does

not illuminate. It will merely add to the upheaval in the field of criminal law.

3. The adoption of this new rule will without doubt affect the finality of state court judgments. It will render that many more cases subject to collateral attacks upon habeas corpus in federal district courts. This will then substitute the decision of one judge as to whether the state has borne its burden of proof beyond a reasonable doubt as to the nonharmful effect of any constitutional error for the considered opinion of the group of appellate judges comprising the bench of the highest state court. Is this test which courts are to adopt, in effect not a consideration of the error in the abstract—when it affects federal constitutional rights? Is the federal district judge to consider the error without any resort to the transcript of the state proceedings and in the solitude of his chamber place himself above the considered judgment of the state criminal administration processes? The result of the rule as enunciated by this Court could accomplish such result.

As in the case at the present, criminal judgments are losing any semblance of finality. Cases are pending in courts after judgment has been affirmed on appeal for many years. Criminals are being released upon society for failure of both the courts and the prosecution to be gifted with sufficient foresight to predict what new constitutional rights will be and to protect against any violation of them even though such later found violations were not believed to be any infringe-

ments of the defendant's rights at the time they were committed.

Certainly, we do not urge that state courts should not give full weight to this Court's decisions and implement to the best of their ability the judgments of this Court. We do believe, however, that where there is no compelling reason for an overturning of the long-considered and valid rules of state courts with relation to harmless error this Court should reconsider the adoption of this new appellate rule relative to federal constitutional rights, and not seek to return to a method repudiated by both Legislatures and Congress some fifty years ago.

This Court recognized in the limitation of its decisions in *Mapp* v. *Ohio,* 367 U.S. 643, *Griffin* v. *California,* 380 U.S. 609, and *Miranda* v. *Arizona,* 384 U.S. 436, by the cases of *Linkletter* v. *Walker,* 381 U.S. 618, *Tehan* v. *Shott,* 382 U.S. 406, and *Johnson* v. *New Jersey,* 384 U.S. 719, its concern for the orderly administration of criminal justice. By the adoption of the present rule, it would throw open all cases in which the state courts had applied their harmless error rules to allegedly federal constitutional errors for review by a federal district court. Patently, such a result would circumvent the previous limitations and without any basic reason for the change arrive at a different conclusion by entirely different standards.

An examination of California criminal cases in recent years fails to disclose virtually any case in which

California's harmless error rule was not invoked. The respective defendant's rights were not substantially impaired but the adoption of this new rule would require sifting through thousands of cases both reported and unreported to determine whether or not this new standard should have been applied. This, without doubt, could seriously impede the administration of justice.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that a rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1966.

Ruth Elizabeth Chapman and Thomas LeRoy Teale, Petitioners, *v.* State of California.	On Writ of Certiorari to the Supreme Court of California.

[February 20, 1967.]

Mr. Justice Black delivered the opinion of the Court.

Petitioners Ruth Elizabeth Chapman and Thomas LeRoy Teale were convicted in a California state court upon a charge that they robbed, kidnaped, and murdered a bartender. She was sentenced to life imprisonment and he to death. At the time of the trial, Art. I, § 13, of the State's Constitution provided that "in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury." Both petitioners in this case chose not to testify at their trial, and the State's attorney prosecuting them took full advantage of his right under the State Constitution to comment upon their refusal to testify, filling his argument to the jury from beginning to end with numerous references to their silence and inferences of their guilt resulting therefrom.[1] The trial court also charged the jury that it too could draw adverse inferences from petitioners' failure to testify.[2] Shortly after the trial, but before

[1] Excerpts of the prosecutor's argument are reproduced in the Appendix to this opinion.

[2] The trial judge charged the jury:

"It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does

petitioners' cases had been considered on appeal by the California Supreme Court, this Court decided *Griffin* v. *California*, 380 U. S. 609, in which we held California's constitutional provision and practice invalid on the ground that it put a penalty on the exercise of a person's right not to be compelled to be a witness against himself, guaranteed by the Fifth Amendment to the United States Constitution and made applicable to California and the other States by the Fourteenth Amendment. See *Malloy* v. *Hogan*, 378 U. S. 1. On appeal, the State Supreme Court, 63 Cal. 2d 178, 404 P. 2d 209, admitting that petitioners had been denied a federal constitutional right by the comments on their silence, nevertheless affirmed, applying the State Constitution's harmless-error provision, which forbids reversal unless "the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."[1] We granted certiorari limited to these questions:

> "Where there is a violation of the rule of *Griffin* v. *California*, No. 609, (1) can the error be held to be harmless, and (2) if so, was the error harmless in this case?" 383 U. S. 956-957.

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testify rests entirely on his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence or as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. . . ."

[1] Cal. Const., Art. VI, § 4½:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

In this Court petitioners contend that both these questions are federal ones to be decided under federal law, that under federal law we should hold that denial of a federal constitutional right, no matter how unimportant, should automatically result in reversal of a conviction, without regard to whether the error is considered harmless, and that, if wrong in this, the various comments on petitioners' silence cannot, applying a federal standard, be considered harmless here.

I.

Before deciding the two questions here—whether there can ever be harmless constitutional error and whether the error here was harmless—we must first decide whether state or federal law governs. The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law. But the error from which these petitioners suffered was a denial of rights guaranteed against invasion by the Fifth and Fourteenth Amendments, rights rooted in the Bill of Rights, offered and championed in the Congress by James Madison, who told the Congress that the "independent" federal judiciary would be the "guardians of those rights."[4] Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied. With faithfulness to the constitutional union of the States, we cannot leave

[4] "If they [the first ten amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Cong. 439 (1789).

to the States the formulation of the authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights. We have no hesitation in saying that the right of these defendants not to be punished for exercising their Fifth and Fourteenth Amendment right to be silent—expressly created by the Federal Constitution itself—is a federal right which, in the absence of appropriate congressional action, it is our responsibility to protect by fashioning the necessary rule.

II.

We are urged by petitioners to hold that all federal constitutional errors, regardles of the facts and circumstances, must always be deemed harmful. Such a holding, as petitioners correctly point out, would require an automatic reversal of their convictions and make further discussion unnecessary. We decline to adopt any such rule. All 50 States have harmless-error statutes or rules, and the United States long ago through its Congress established for its courts the rule that judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties." 28 U. S. C. § 2111.[8] None of these rules on its face distinguishes between federal constitutional errors and errors of state law or federal statutes and rules. All of these rules, state or federal, serve a very useful purpose insofar as they block

[8] 28 U. S. C. § 2111 provides:
"On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."
Fed. Rule Crim. Proc. 52 (a) provides:
"Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."
See also Fed. Rule Civ. Proc. 61.

setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial. We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not resulting in the automatic reversal of the conviction.

III.

In fashioning a harmless-constitutional-error rule, we must recognize that harmless-error rules can work very unfair and mischievous results when, for example, highly important and persuasive evidence, or argument, though legally forbidden, finds its way into a trial in which the question of guilt or innocence is a close one. What harmless-error rules all aim at is a rule that will save the good in harmless-error practices while avoiding the bad, so far as possible.

The federal rule emphasizes "substantial rights" as do most others. The California constitutional rule emphasizes "a miscarriage of justice," [6] but the California courts have neutralized this to some extent by emphasis, and perhaps over-emphasis, upon the court's view of "overwhelming evidence." [7] We prefer the approach of this Court in deciding what was harmless error in our recent case of *Fahy* v. *Connecticut*, 375 U. S. 85. There we said: "The question is whether there is a reasonable possibility that the evidence complained of might have

[6] The California statutory rule, like the federal rule, provides that "[a]fter hearing the appeal the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties." Cal. Pen. Code § 1258.

[7] The California Supreme Court in this case did not find a "miscarriage of justice" as to petitioner Teale, because it found from "other substantial evidence, [that] the proof of his guilt must be deemed overwhelming." 63 Cal. 2d, at 197, 404 P. 2d, at 220.

contributed to the conviction." *Id.*, at 86. Although our prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error,[8] this statement in *Fahy* itself belies any belief that all trial errors which violate the Constitution automatically call for reversal. At the same time, however, like the federal harmless-error statute, it emphasizes an intention not to treat as harmless those constitutional errors that "affect substantial rights" of a party. An error in admitting plainly relevant evidence which possibly influenced the jury adversely to a litigant cannot, under *Fahy*, be conceived of as harmless. Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless. It is for that reason that the original common-law harmless-error rule put the burden on the beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment.[9] There is little, if any, difference between our statement in *Fahy* v. *Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. We, therefore, do no more than adhere to the meaning of our *Fahy* case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a

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[8] See, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (coerced confession); *Gideon* v. *Wainwright*, 372 U. S. 335 (right to counsel); *Tumey* v. *Ohio*, 273 U. S. 510 (impartial judge).

[9] See generally 1 Wigmore, Evidence § 21 (3d ed.).

reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test,[10] it is a familiar standard to all courts, and we believe its adoption will provide a more workable standard, although achieving the same result as that aimed at in our *Fahy* case.

IV.

Applying the foregoing standard, we have no doubt that the error in these cases was not harmless to petitioners. To reach this conclusion one need only glance at the compilation of prosecutorial comments prepared from the record by petitioners' counsel, which compilation is attached to this opinion as an Appendix. The California Supreme Court fairly summarized the extent of these comments as follows:

> "Such comments went to the motives for the procurement and handling of guns purchased by Mrs. Chapman, funds or the lack thereof in Mr. Teale's possession immediately prior to the killing, the amount of intoxicating liquors consumed by defendants at the Spot Club and other taverns, the circumstances of the shooting in the automobile and the removal of the victim's body therefrom, who fired the fatal shots, why defendants used a false registration at a motel shortly after the killing, the meaning of a letter written by Mrs. Chapman several days after the killing, why Teale had a loaded weapon in his possession when apprehended, the meaning of statements made by Teale after his apprehension, why certain clothing and articles of personal property were shipped by defendants to Missouri, what clothing Mrs. Chapman wore at the time of the killing, conflicting statements as to Mrs. Chapman's whereabouts immediately preceding the

[10] Cf. *Woodby* v. *Immigration Service*, 385 U. S. —.

killing and, generally, the overall commission of the crime." 63 Cal. 2d, at 196, 404 P. 2d, at 220.

Thus, the state prosecutor's argument and the trial judge's instruction to the jury continuously and repeatedly impressed the jury that from the refusal of petitioners to testify, to all intents and purposes, the inferences from the facts in evidence had to be drawn in favor of the State—in short, that by their silence petitioners had served as irrefutable witnesses against themselves. And this was in a case that, while presenting a reasonably strong "circumstantial web of evidence" against petitioners, 63 Cal. 2d, at 197, 404 P. 2d, at 220, was also a case in which, absent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions. Such a machine-gun repetition of a denial of constitutional rights, all designed and calculated to make petitioners' version of the evidence worthless, can no more be considered harmless than the introduction against a defendant of a coerced confession. See, *e. g.*, *Payne* v. *Arkansas*, 356 U. S. 560. Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.

Reversed.

APPENDIX.

Argument and Comments by the Prosecutor on the Failure of the Defendants to Take the Witness Stand

"Mr. Ferguson: Now, ladies and gentlemen, I don't know which one of these weapons was purchased first, I don't know that it particularly makes any difference, but as you know, we have had no testimony at all in that regard, in fact, I might add that the only person or persons that could give testimony in that regard would be, of course, the defendants themselves.

. . . . . .

"Now, this, there's no question about what this represents, or for the record here, no question in your minds, this is not the weapon that Ruth Elizabeth Chapman purchased in Reno, Nevada, on October the 12th, 1962. I don't know where that weapon is, ladies and gentlemen, and you don't know where it is, you've heard no testimony from the stand at all, and once again, the only person or persons that could tell us about where the original .22 caliber Vestpocket is today would be one or the other of the defendants or both.

. . . . . .

"This would indicate that there was no small struggle—it would indicate that the body, almost lifeless, was dragged or left in some fashion which would cause a shirt or an article of clothing to tear, one or the other. Once again, ladies and gentlemen, I don't know. I wasn't out there, you were not out there. You heard no testimony on the stand. The only individuals that could give you that information would be the defendants, either one or both of them, Thomas Leroy Teale and Ruth Elizabeth Chapman. And of course you know that you have not heard from them.

"Now, I will comment throughout my entire opening argument to you in reference to the fact that neither one of these defendants has seen fit to go up, raise their right hand, take that witness stand, tell you ladies and gentlemen of the jury exactly what did occur, explain to you any facts or details within their knowledge so that you would know. You would not have to—by His Honor's instructions you can draw an adverse inference to any fact within their knowledge that they could testify to, and they have not subjected themselves, either one or both, to cross-examination. Now, that is—so there is no question in your mind, once again with reference to a defendant taking the stand, none—you are—you or I or anyone else is not required under our legal system in these United States and under the Constitution, you can not be made to testify against yourself or for yourself, as far as that goes.

"So, it is a Constitutional right, and both of these defendants have seen fit to avail themselves of that Constitutional right, but I say to you ladies and gentlemen, there are many things in this case, and I will try to point them out to you, at least some, probably not all, that these defendants are in a position to take that stand and to testify under oath and give you facts concerning. They have not seen fit to avail themselves of that opportunity.

. . . . . .

"Now whether or not Mr. Teale had any other money at the time or was in the habit of concealing his money in different departments, I don't know, and ladies and gentlemen, you don't know, because you have not had any testimony from that witness stand, and the only person that could clear this up for us ladies and gentlemen is the defendant Thomas Leroy Teale. Ladies and gentlemen, he has not seen fit to tell you about that. But certainly we know that bogus checks are being writ-

ten, and as I recall we know that—I don't—we may infer, if you wish to believe there is an inference which Mr. Teale could have cleared up, that that was all the money that we had, and he didn't clear it up, so you may draw an adverse inference from that, that that was all the money he had, or in fact that he—at that time he was in desperate need of funds, and you know that through some kind of a discussion between these two defendants in regard to Mr. Teale shooting dice, that this was all he had.

. . . . . .

"Now, ladies and gentlemen, in reference to the weapons being purchased in Reno, Nevada on October 12th, you have heard, ladies and gentlemen, no testimony, and you will recall clearly, you are going to have some difficulty, you really are in reference to what is and what isn't evidence in this case, and believe me I have a few comments to say on that a little later on, but if you will recall as far as evidence is concerned of the truth of anything at all, you don't have any evidence on these—why these pistols were purchased. Why did Ruth Elizabeth Chapman buy two weapons? Well, you do recall that she told on one occasion that she had had a pistol stolen from her vehicle, her automobile, when she was taking a little trip across country, you remember that testimony, and you can rely on the testimony that you actually hear, ladies and gentlemen, from the stand. She told that, and of course you can only rely that she told the gentleman that, that she had had another one stolen, and so that she needed one to replace it. But why two, ladies and gentlemen? You don't need two. If she is going to be attacked she wasn't going to use one in each hand I assume to defend herself, and there is another area, ladies and gentlemen besides this that I mentioned to you before, that since you have no testimony from the stand, you must surmise from all facts and circumstances

as to the exact reason why they were purchased, because the only one in this room that could tell you why these guns were purchased is either one or both of the defendants. Certainly the defendant Ruth Elizabeth Chapman could tell you, she could tell you under oath, she could subject herself to cross-examination, and she could tell you then and it would be evidence before you. Once again she has not chosen to do this. So any inference you may draw therefrom will be an adverse inference under the circumstances, and under the instructions of the Court. . . .

"So, we know, ladies and gentlemen, that they had the motive, we know that they had the means, we know that they had the opportunity. We also know that they were at that scene, ladies and gentlemen, they were with that man just a matter of minutes before he was shot in the head three times with a gun similar to People's Exhibit No. 12. Now, if they weren't there, and I think the evidence clearly shows they were, scientific evidence, that we'll talk about a little later. Once again, why don't they come up and raise their right hand and tell you about it?

"Mr. Ferguson: To me they are charged with serious crimes, ladies and gentlemen. They can come up and testify and then it will be evidence for you to consider in this case. If they had just come up and told you about this, because they were there. If they left the Spot Club and just went on their way, well, of course they didn't, the evidence clearly shows they didn't, but you may draw the adverse inference from their refusal to come before you and raise that right hand and incidentally, of course, subject themselves to cross-examination. . . .

"I think it is not an unreasonable inference to infer at this time if the defendants were drinking beer earlier in the evening in Croce's, it's not unreasonable to infer they continued drinking the same thing, therefore the two glasses remaining that had been washed, but not put up were the defendants'. I don't know, it is an inference, I wasn't there, we have had no testimony whatsoever as to what they were drinking at the Spot Club, once again, neither one of the defendants have seen their way clear to come up and tell you what they were drinking if it was beer.

. . . . . .

"So you can see that whichever one of these defendants shot him, because we have had no testimony from that witness stand to tell you who shot him, and the only two persons in this courtroom that could tell you which one of them it was that shot him are the two defendants; but once again, they have both decided that they will not get up and raise their right hand and testify in this regard and subject themselves to cross-examination, so all we know is that one of them shot him.

. . . . . .

"We don't know the time here, it doesn't say. We don't have any testimony, ladies and gentlemen, in this regard, and I might say once again in reference to this last, the use of the name, T. L. Rosenthal, Mr. and Mrs., we don't know why, ladies and gentlemen, that name was used. We don't know why, ladies and gentlemen, that UZV 155—was 156 originally on here. You don't know that, and I don't because we haven't had the testimony from the witness stand on it. Now we know it is in the handwriting of Ruth Elizabeth Chapman, and there is no question about that. She wrote it. It could be evidence, ladies and gentlemen, for you. It could be

evidence as to why she wrote the name, and why that five was changed to a six. We could have it. But we don't, because either one or both of the defendants, neither one, have seen fit to take the stand and to testify in that regard. Then this would be evidence that you can consider. But also ladies and gentlemen, subject to taking the oath and subject to cross-examination.

. . . . . .

"We see it here in Mountain View, the Mountain View Motel, the name of Teale, but we don't have the testimony of the defendants and ladies and gentlemen they are the only ones here in this case that could get up there and tell you why they used a phony name two hours after the crime and why they didn't put the correct license down and whatever inference you draw you are permitted to draw since they do not choose to tell you an adverse interest, and I would say, ladies and gentlemen, that it is an adverse interest to the defendants. It shows a consciousness of guilt.

. . . . . .

"Now, ladies and gentlemen, what is this—first of all, 'I thought I'd better let you know that Tom arrived here today and we're going south tomorrow'? Now, what does that mean? Well, I think without saying a great deal more about it that each one of you can certainly infer as to what it very readily could mean, especially if one had in fact committed a robbery and kidnapped someone from the premises and that individual has ended up dead, shot three times in the head. And further, ladies and gentlemen, the only other thing I can say about it is this, who can really tell you and who could have told you from evidence, from the witness stand, what that letter means? Well, the only one is Ruth Elizabeth Chapman, ladies and gentlemen. If it didn't mean what you can reasonably infer that it means, then I say, ladies and gentlemen, she could have come

up here and testified, gotten on the witness chair. We have had many witnesses in this case, no one I would assume more interested than Ruth Elizabeth Chapman, or the co-defendant, neither one took the stand. She in no way, nor has there been any way, ladies and gentlemen, any kind of evidence that has actually been admitted for the truth of the evidence, in no way is there any evidence as to why she wrote that letter, and what she meant by 'Tom is arriving today and we're going south.' Once again, she did not choose to tell you. So, we may only infer, and this will be, of course, you will have to in your final analysis draw any inferences from that that you feel are appropriate and are proper—

. . . . . .

"Mr. Ferguson: He was a fugitive from justice, and he knew he was a fugitive from justice, and he never—let's face it, there were four F.B.I. agents and these fellows are professional and they know what they are doing and one of them had a gun out and he never had an opportunity to use it, and none of us here will ever know from all the testimony, from the actual testimony on the stand why he had the weapon with him fully loaded, because Mr. Teale has never taken the stand in this case and testified for you. These things are things only within his knowledge, ladies and gentlemen. If there is any fact in this case of any relevancy of any importance it is within the knowledge of a defendant, and they chose not to take the stand and tell you about it, where incidentally they were under oath and can be cross-examined. You may draw an adverse inference from the fact that they do not take it. I think the inference is very clear, too, why they had this weapon here and why he never—why it was fully loaded. Remember there was never an opportunity to use it. The weapon was purchased by Ruth Elizabeth Chapman. Now when he is apprehended and fleeing from the State he had it with him it was fully loaded. Once again, I

don't know where the original is here, and you know the only two that can tell us where that is.

. . . . . .

"Now, you recall also that when Mr. Basham took him back in, was fingerprinting him, etc., he told him he was wanted in California and no one mentioned anything about Lodi, and he said that he would waive extradition, and he also did say he said, 'They will have a hard time proving I was there.' And Teale himself did mention Lodi. Well, I don't know what he meant by that statement. I certainly can draw my own conclusion, and you sure will draw yours as the triers of the facts and the judges of the facts, ladies and gentlemen, but once again Mr. Teale did not take the stand and testify under oath in this case, and Mr. Teale has not desired to take the stand and explain what he meant by it. He didn't have to, of course, but once again you can draw whatever inferences you may feel, and the law is clear that you may draw an adverse—where a defendant does not explain and he does not choose to take the stand and explain it to you, you can draw an adverse inference.

. . . . . .

"Photographs. You've seen them, ladies and gentlemen, but as you recall the doctor now is pointing, and this is the picture of the deceased, the back of his head, as to where he was shot in the back of the head, you recall the other one as to where he was shot in the side of the head, right here on the left in the general area of where the glasses would be, I think it's a most reasonable inference, ladies and gentlemen. Now, once again we have had no testimony except what would seem clearly logical from the experts, the way the body was found, where he'd been shot, what he'd been shot with, and the position of the glasses in relation to the body at the death scene, we had no other testimony. Certainly none from the defendants in this case.

. . . . . .

". . . Agent Gilmore has drawn and made some notations in reference to where that blood was located, blood found on these shoes. Now, all we know, ladies and gentlemen, as far as evidence in this case is concerned, is that these shoes belonged to Ruth Elizabeth Chapman and they were in her possession when she was apprehended in St. Joseph, Missouri, and why do I say that's all you know? That's all you may take into consideration, ladies and gentlemen, because we have no other testimony on this witness stand in relation to any of these articles of clothing that are actually admitted into evidence.

. . . . . .

"You have two box lids, two of them, and you've heard the questions concerning them, they would indicate that they were sent to a Mrs. Howard Smith at 2206 Castle Avenue, St. Joseph, Missouri, and I believe it was on the 11th of October, says from Thomas Teale, 1105 Del Norte, Eureka, California, they both say essentially the same thing, 10-11 there's no year, but I think we can surely infer it was in 1962, and apparently from Reno.

"Now, ladies and gentlemen, there's been a lot of talk, suggestion, and whatever you want to call it, I'll call it a smoke screen, in reference to these two lids that came off, and we'll assume there was a box underneath them, I don't think there's any question about that. Where have you ever heard from that witness stand, ladies and gentlemen, what was ever in those boxes? Now, you've heard some self-serving declarations that are not admitted into evidence because they come through someone else who in some fashion gets testimony before you, but no cross-examination of the original party who is giving that kind of testimony, and you can't consider it.

. . . . . .

"Mr. Ferguson: Thank you, Your Honor. Counsel has interjected himself into this, and he'll have every oppor-

tunity to make his own comments, and I'm sure he'll most adequately express himself when the time comes. I'm telling you, ladies and gentlemen, that the only evidence that you have is that you have two box tops. Now, he's just suggested to you, so I'll answer this ahead of time, but the evidence is clear that Mr. Sperling packed these boxes, but you will recall Mr. Sperling was not at the original scene when they were taken. Maybe it isn't unusual to infer there may have been clothes, but what I'm getting at is this is what clothing? You don't even know there was clothing in them when they were shipped. It could have been other household articles. And even if we assume it was clothing, and that's not unreasonable because basically these are the items we found and brought back with us to Lodi, we don't know which clothing she shipped at this time. Couldn't this be cleared up for us, though? It could be cleared up so easily. Ruth Elizabeth Chapman is sitting right over here, she is one of the defendants in this case and she is the one certainly if anyone, if anyone in this room, or in this state knows what was in those boxes she is the one, but once again she did not take the stand, raise her right hand, and tell you about that. She didn't take the stand at all, ladies and gentlemen, she could have come up and told us exactly what articles were sent, so you may draw any inferences from that that you wish to, as long as they are reasonable.

"Now, anything that—is clearly, and I'm sure you know by now and I don't have to repeat it too often, anything in this case that Mr. Teale could get up here now, he don't have to get up here, but all of the things that have been said in this trial and all of the physical evidence and the testimony, he's right here in Court and could he not get up and if there is anything to be said he has the opportunity to say it. Otherwise, you may

draw the adverse inference from the fact that he doesn't get up there and tell you about it, and that, ladies and gentlemen, is his defense. Mr. Fransen said in the beginning that what happened in this case is not as the prosecution described it. That the facts will show an entirely different version. Well, I haven't heard any facts, ladies and gentlemen, that show an entirely different version.

"We went through a business with a—dress. We held it up, and then we pointed out the one that she's wearing now, and frankly, ladies and gentlemen, the only one in the Court room that can tell you whether or not it is the same dress is Ruth Elizabeth Chapman, because you know from the evidence no one has ever had an opportunity to examine that dress to see whether it has been dry cleaned, whether or not it was purchased—when it was purchased or the labels on it or anything else. All that has been done in this thing is to wear a blue knit dress, ladies and gentlemen, which is similar to the one that—she in fact apparently wore on that night.

"So, I suppose that just through the wearing of it, having it in Court, it is hoped that you will draw something from it, which I have heard no testimony on the stand, except that it looks like or is similar to it. . . .

"But what she told that doctor is not evidence in this case, and yet you know that repeatedly and over and over and over again Mr. Johnson in every way that he could, he would get the story again before you. Now, why? You know why. . . He did it because he hopes that you wouldn't forget it, although he could put it and make it evidence in this case, which it is not, and if you put Ruth Elizabeth Chapman upon that stand to testify, so it is one way of doing, ladies and gentlemen, if you are going to be taken in by it, indirectly what you can't

do directly, because there is no other way that he can get that thing before you without putting her up on that stand.

. . . . . .

"But she gave a story on the night of the 17th and early hours of the 18th. She was in San Francisco. Now, why pick on that date so specifically if you are not—if not to beware of that date, that you want to beware. Well, he says, 'You have given two different stories. Do you have problems with blackouts or excessive drinking', and she says 'No.' And I tell you, ladies and gentlemen, that anybody, and there is no evidence to the contrary in this case, if you don't honestly remember what occurred and you know, you are in a situation where there is a fugitive warrant and you have just been arrested and you in all honesty don't remember where you were, that is the first thing that you are going to say. You're not going to sit up and trump up excuses and make out a story which you know to be a lie about specific dates and times. And, ladies and gentlemen, there is no legal evidence before you that it is anything to the contrary, because the only one now that can come up and tell you has not seen fit to do so.

". . . Mr. Johnson would have you believe that everything she said was the truth. I think there are some instances that indicate already—I have indicated some, the purpose of the guns, two different ideas there as to why they were purchased, but that is the only legal purpose for that. So it's not evidence, although Mr. Johnson again I say argued and referred to it as though it was. We have no evidence from the lips of Mrs. Chapman. Now, as Mr. Ferguson told you, it is their constitutional right, and I won't go into that again, because I think he handled it very clearly as well as the others, but that is within her right to do as she sees fit.

But, you can consider it for the purposes and under the circumstances that Mr. Ferguson indicated a number of times.

. . . . . .

"Originally when Dr. Winkler examined her on the 31st, I believe it was, of October, 1962, she told him that she had forgotten after the first shot was fired, after the first shot was fired. Since that time what has happened? The amnesia, or disassociative state, or disassociative reaction, whichever way you want to look at it, psychiatrically or otherwise, seems to have backed up from Dillard Road back up to the Spot Club, back up down Highway 99 south to just outside of Croce's, and by the time we get through cross-examining Dr. Sheuerman it even backed in to Croce's. A vague area. Very interesting. We could have put it on, put the statement in. It's evidence? It's not. Again, the sanctity and worthiness of evidence would have to come from her lips, hers on the stand here. Why? Here again, because witnesses would be under oath again, and I repeat, and I repeat for emphasis, they would have to be under oath subject to cross-examination before your very eyes so that you could evaluate it. Oh yes. She said this and she said that. Why said it? Who said it? Ruth Elizabeth Chapman on the stand? No. Dr. Sheuerman said that she said it. Dr. Winkler said that she said. Mr. Johnson said that she said. Well, it's an interesting thing that the only witnesses who weren't here, or weren't on the stand to be cross-examined, the only witnesses who are alive today to the perpetration of these offenses, are these two defendants. That's all. They don't have to take the stand. That's been gone over many times, but you know it would be a fine thing, very fine deed if persons who perpetrated offenses gave a story, put a story on by somebody else, have somebody else speak for you—wouldn't it? It would be a very interesting thing.

You would never have the benefit of evaluating their credibility. This is what Mr. Johnson would have you believe that we should have done. Monday morning quarterbacking. And I submit to you—you know, you—you have heard much about lawyers being referred to as 'mouthpieces.' It's actually a very rare thing, really, that that type of appellation is applicable to lawyers really. But, I think you have seen a demonstration here, and I'm not saying it in rancor, not anything of it at all, because this is a demonstration where actually Ruth Elizabeth Chapman is speaking through Mr. Johnson. A 'mouthpiece.'

. . . . .

"Maybe there is another reasonable one, other than the fact that it was Adcock's blood, because all three who were in the car had type A. Maybe there is, but you haven't heard it. You haven't heard any reasonable explanation of that. So, you can draw an adverse inference that it was Billy Dean Adcock's blood. . . .

"Mr. Johnson said these several things which I will go over again. The evidence showed here that she bought two guns for Teale. What evidence? No witness on the stand got up there and said specifically under oath, and the only one that could do it would be Elizabeth Chapman herself. This is hearsay, what she told somebody else for the sole purpose of determining what her state of mind was at the time. It's not evidence. There's some evidence from her own lips through Dennis Mack as to the reason she bought the gun, which is different than what she said otherwise. Mr. Johnson said the evidence shows there was an argument in Fresno. Here again I would say, 'What evidence?' The next one—there are only two people there to that argument, and the only way it would be evidence, or testimony in this case, would be if either one or both of them got up there and said there was an argument. They chose not

to do it. You can draw an adverse inference that that being within their knowledge, that they could explain, whether it was or not. You can draw an inference that it wasn't the type of argument that Mr. Johnson claims the evidence shows, because the evidence doesn't show that at all.

"So far as the motive is concerned for the murder in a perpetration of a robbery, the motive was set, to gain for their own desires and lusts and so forth, to gain from it. It was a crime of gain, and perhaps another thing too, in deciding—we don't know who pulled the trigger—we may never know. The defendants haven't indicated it, except through Teale in one—Mr. Vowell's testimony, as to what Mr. Teale said, but that is not admissible against, and you shouldn't consider it against, Ruth Elizabeth Chapman, but maybe the circumstances of who pulled the trigger might have been a factor that might have been important to you. Only two people know. They didn't tell you. That is the way they want to proceed. But nonetheless, you can consider that too.

. . . . . .

"So, in considering what happened here as to why this person was killed, you see you can weigh these things and decide what the motive was. You might have had some help in deciding this very difficult task from the very only two people remaining who were at the scene, but in their best judgment they didn't choose to get up and tell you about it, which you certainly can consider that fact that they did not in the light of using your reason as I have indicated here too.

. . . . . .

"You know that somebody shot Billy Dean Adcock, and you know that it was either—it was one or even both of these defendants, in view of your verdict, but which one you don't know. Now, this is something that perhaps might have been of help to you in deciding what

punishment to mete out, whether both should be punished equally in this case, or whether there should be some distinction between the two. It might have been helpful to know who pulled that trigger, for if it was Ruth Elizabeth Chapman you could well deduce that it was either her intoxication or emotional stress or a jealousy of Teale, or anger, and a lot of things other than the motive to destroy a witness; whereas, with respect to Mr. Teale it would seem to be a logical thing to conclude that he wanted to get rid of the only eyewitness. Differences there, you see. But you don't know. You don't know whether they did it in consort. You don't know that as far as pulling the trigger. But this is a factor which has not been brought to light, and you can consider that factor which has not been, from the standpoint there have been two people that might have explained that.

"I have gone into the statement here and why it hasn't been presented. If you are going to decide things such as character and sympathy, the law says you may take into consideration, how can you do it by a statement? Now, we are talking about this phase of the case. This now. You like to know that persons get—if there is something about their background that they can tell you, or something about their background that they can tell you, you like to hear it from them, because you have a very serious and difficult task, and the fact that they chose to rest upon whatever evidence there is here in the case in chief is something that you can consider in deciding whether or not they have been fair with you.

"This is the chance that they take by not having taken the stand."

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1966.

Ruth Elizabeth Chapman and Thomas LeRoy Teale, Petitioners, v. State of California.	On Writ of Certiorari to the Supreme Court of California.

[February 20, 1967.]

Mr. Justice Stewart, concurring in the result.

In devising a harmless-error rule for violations of federal constitutional rights, both the Court and the dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were "harmless." Illustrations of the principle are legion.

When involuntary confessions have been introduced at trial, the Court has always reversed convictions regardless of other evidence of guilt. As we stated in *Lynum* v. *Illinois*, 372 U. S. 528, 537, the argument that the error in admitting such a confession "was a harmless one . . . is an impermissible doctrine." That conclusion has been accorded consistent recognition by this Court. *Malinski* v. *New York*, 324 U. S. 401, 404; *Payne* v. *Arkansas*, 356 U. S. 560, 568; *Spano* v. *New York*, 360 U. S. 315, 324; *Haynes* v. *Washington*, 373 U. S. 503, 518–519; *Jackson* v. *Denno*, 378 U. S. 368, 376–377. Even when the confession is completely "unnecessary" to the conviction, the defendant is entitled to "a new

trial free of constitutional infirmity." *Haynes* v. *Washington, supra,* at 518–519.[1]

When a defendant has been denied counsel at trial, we have refused to consider claims that this constitutional error might have been harmless. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States,* 315 U. S. 60, 76. That, indeed, was the whole point of *Gideon* v. *Wainwright,* 372 U. S. 335, overruling *Betts* v. *Brady,* 316 U. S. 455. Even before trial, when counsel has not been provided at a critical stage, "we do not stop to determine whether prejudice resulted." *Hamilton* v. *Alabama,* 368 U. S. 52, 55; *White* v. *Maryland,* 373 U. S. 59, 60.

A conviction must be reversed if the trial judge's remuneration is based on a scheme giving him a financial interest in the result, even if no particular prejudice is shown and even if the defendant was clearly guilty. *Tumey* v. *Ohio,* 273 U. S. 510, 535. To try a defendant in a community that has been exposed to publicity highly adverse to the defendant is *per se* grounds for reversal of his conviction; no showing need be made that the jurors were in fact prejudiced against him. *Sheppard* v. *Maxwell,* 384 U. S. 333, 351–352; cf. *Rideau* v. *Louisiana,* 373 U. S. 723, 727. See also *Estes* v. *Texas,* 381 U. S. 532, 542–544, 562–564, 593–594.

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[1] None of these decisions suggests that the rejection of a harmless-error rule turns on any unique evidentiary impact that confessions may have. *Haynes* v. *Washington,* 373 U. S. 503, specifically contradicts that notion. In addition to the confession found inadmissible by this Court, the defendant in *Haynes* had given two prior confessions, the admissibility of which was not disputed, and "substantial independent evidence" of guilt existed. The Court accepted the prosecution's contention that the inadmissible confession played little if any role in the conviction.

When a jury is instructed in an unconstitutional presumption, the conviction must be overturned, though there was ample evidence apart from the presumption to sustain the verdict. *Bollenbach* v. *United States*, 326 U. S. 607, 614–615. Reversal is required when a conviction may have been rested on a constitutionally impermissible ground, despite the fact that there was a valid alternative ground on which the conviction could have been sustained. *Stromberg* v. *California*, 283 U. S. 359, 367–368; *Williams* v. *North Carolina*, 317 U. S. 287, 292. In a long line of cases leading up to and including *Whitus* v. *Georgia*, — U. S. —, it has never been suggested that reversal of convictions because of purposeful discrimination in the selection of grand and petit jurors turns on any showing of prejudice to the defendant.

To be sure, constitutional rights are not fungible goods. The differing values which they represent and protect may make a harmless-error rule appropriate for one type of constitutional error and not for another. I would not foreclose the possibility that a harmless-error rule might appropriately be applied to some constitutional violations.[2] Indeed, one source of my disagreement with the Court's opinion is its implicit assumption that the same harmless-error rule should apply indiscriminately to all constitutional violations.

But I see no reason to break with settled precedent in this case, and promulgate a novel rule of harmless error applicable to clear violations of *Griffin* v. *California*, 380

[2] For example, quite different considerations are involved when evidence is introduced which was obtained in violation of the Fourth and Fourteenth Amendments. The exclusionary rule in that context balances the desirability of deterring objectionable police conduct against the undesirability of excluding relevant and reliable evidence. The resolution of these values with interests of judicial economy might well dictate a harmless-error rule for such violations. Cf. *Fahy* v. *Connecticut*, 375 U. S. 85, 92 (dissenting opinion).

U. S. 609.[3] The adoption of any harmless-error rule, whether the one proposed by the Court, or by the dissent, or some other rule, commits this Court to a case-by-case examination to determine the extent to which we think unconstitutional comment on a defendant's failure to testify influenced the outcome of a particular trial. This burdensome obligation is one that we here are hardly qualified to discharge.

A rule of automatic reversal would seem best calculated to prevent clear violations of *Griffin* v. *California*. This case is one in which the trial occurred before the *Griffin* decision but which was not final on appeal until afterwards, so the doctrine of prospectivity announced in *Tehan* v. *Shott*, 382 U. S. 406, does not reach it. But the number of such cases is strictly limited. Prosecutors are unlikely to indulge in clear violations of *Griffin* in the future, and if they do I see no reason why the sanction of reversal should not be the result.

For these reasons I believe it inappropriate to inquire whether the violation of *Griffin* v. *California* that occurred in this case was harmless by any standard, and accordingly I concur in the reversal of the judgment.

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[3] Earlier this Term, in *O'Connor* v. *Ohio*, 385 U. S. 92, we reversed a conviction on the basis of *Griffin* v. *California*, 380 U. S. 609, without pausing to consider whether the comment on the defendant's silence might have been harmless error under the rule the Court announces today, or any other harmless-error rule.

SUPREME COURT OF THE UNITED STATES

No. 95.—October Term, 1966.

Ruth Elizabeth Chapman and Thomas LeRoy Teale, Petitioners, *v.* State of California.	On Writ of Certiorari to the Supreme Court of California.

[February 20, 1967.]

Mr. Justice Harlan, dissenting.

The Court today holds that the harmlessness of a trial error in a state criminal prosecution, such error resulting from the allowance of prosecutorial comment barred by the Fourteenth Amendment, must be determined under a "necessary rule" of federal law. The Court imposes a revised version of the standard utilized in *Fahy* v. *Connecticut*, 375 U. S. 85, on state appellate courts not because the Constitution requires that particular standard, but because the Court prefers it.

My understanding of our federal system, and my view of the rationale and function of harmless-error rules and their status under the Fourteenth Amendment, lead me to a very different conclusion. I would hold that a state appellate court's reasonable application of a constitutionally proper state harmless-error rule to sustain a state conviction constitutes an independent and adequate state ground of judgment. Believing this to be the situation here, I would dismiss the writ. *Viator* v. *Stone*, 336 U. S. 948.

I.

The key to the Court's opinion can, I think, be found in its statement that it cannot "leave to the States the formulation of the authoritative laws, rules and remedies designed to protect people from infractions by the states

of federally guaranteed rights," and that "in the absence of appropriate congressional action" the Court must fashion protective rules. The harmless-error rule now established flows from what is seemingly regarded as a power inherent in the Court's constitutional responsibilities rather than from the Constitution itself. The Court appears to acknowledge that other harmless-error formulations would be constitutionally permissible. It certainly indicates that Congress, for example, could impose a different formulation.[1]

I regard the Court's assumption of what amounts to a general supervisory power over the trial of federal constitutional issues in state courts as a startling constitutional development that is wholly out of keeping with our federal system and completely unsupported by the Fourteenth Amendment where the source of such a power must be found. The Fourteenth Amendment guarantees individuals against invasions by the States of fundamental rights, *Palko* v. *Connecticut*, 302 U. S. 319, and under more recent decisions of this Court some of the specifics of the Bill of Rights as well. See, *e. g.*, in the context of this case, *Malloy* v. *Hogan*, 378 U. S. 1; *Griffin* v. *California*, 380 U. S. 609. It thus serves as a limitation on the actions of the States, and lodges in this Court the same power over state "laws, rules and remedies" as the Court has always had over the "laws, rules and remedies" created by Congress. This power was classically described by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, 178:

> "So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the

[1] For myself, I intimate no view on congressional power with respect to state courts in this regard.

constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. . . ."

Nothing in the Fourteenth Amendment purports to give federal courts supervisory powers, in the affirmative sense of *McNabb* v. *United States*, 318 U. S. 332, over state courts. See *id.*, at 340–341. Moreover, where the constitutional power described by Marshall has been invoked, the Court has always been especially reluctant to interfere with state procedural practices. See *Spencer* v. *Texas*, — U. S. —. From the beginning of the federal union, state courts have had power to decide issues of federal law and to formulate "authoritative laws, rules and remedies" for the trial of those issues. The primary responsibility for the trial of state criminal cases still rests upon the States, and the only constitutional limitation upon these trials is that the laws, rules, and remedies applied must meet constitutional requirements. If they do not, this Court may hold them invalid. The Court has no power, however, to declare which of many admittedly constitutional alternatives a State may choose.[1] To impose uniform national requirements when alternatives are constitutionally permissible would destroy that opportunity for broad experimentation which is the genius of our federal system.

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[1] Cases in which lower federal courts, acting under the authority of the Fourteenth Amendment, as expanded by this Court's decision in *Reynolds* v. *Sims*, 377 U. S. 533, have promulgated their own reapportionment plans may superficially be thought to support such a power. *E. g.*, *Reynolds* v. *State Election Bd.*, 233 F. Supp. 323. But such cases are quite apart from the present one because they arise from a situation where some positive constitutional action is a necessity and thus require the exercise of special equity powers. Here the ordinary remedy of striking down unconstitutional harmless-error rules and applications is sufficient to deal with any problem that may arise. There is no necessity for a State to have a harmless-error rule at all.

Even assuming that the Court has the power to fashion remedies and procedures, binding on state courts, for the protection of particular constitutional rights, I could not agree that a general harmless-error rule falls into that category. The harmless-error rules now utilized by all the States and in the federal judicial system are the product of judicial reform early in this century. Previously most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts through the efforts of Baron Parke, and held that any error of substance required a reversal of conviction. See Orfield, Criminal Appeals in America 190. The reform movement, led by authorities like Roscoe Pound and Learned Hand, resulted in allowing courts to discontinue using reversal as a "necessary" remedy for particular errors and "to substitute judgment for the automatic application of rules . . . ." 4 Barron, Federal Practice and Procedure § 2571, at 438. This Court summarized the need for that development in the leading case of *Kotteakos* v. *United States*, 328 U. S. 750, 759.

> "§ 269 [a federal harmless error provision] and similar state legislation grew out of a widespread and deep conviction over the general course of appellate review in American criminal causes. This was shortly, as one trial judge put it after § 269 had become law, that courts of review 'tower above the trials of criminal cases as impregnable citadels of technicality.' . . . [C]riminal trial became a game for sowing reversible error in the record."

Holding, as is done today, that a special harmless-error rule is a necessary remedy for a particular kind of error revives the unfortunate idea that appellate courts must act on particular errors rather than decide on reversal by an evaluation of the entire proceeding to determine whether the cause as a whole has been determined accord-

ing to properly applicable law. In this case, California has recognized the impropriety of the trial comment here involved, and has given clear direction to state trial courts for the future. Certainly this is the appropriate remedy for the constitutional error committed. The challenged decision has no direct relation to federal constitutional provisions, rather it is an analysis of the question whether this admittedly improper comment had any significant impact on the outcome of the trial. In *Kotteakos, supra,* this Court described the "material factors" in harmless-error determinations as "the character of the proceeding, what is at stake upon its outcome, and the relation of the error asserted to casting the balance for decision on the case as a whole . . . ." *Id.,* at 762. None of these factors has any relation to substantive constitutional provisions, and I think the Court errs in conceiving of an application of harmless-error rules as a remedy designed to safeguard particular constitutional rights.[3] It seems clear to me that harmless-error rules concern, instead, the fundamental integrity of the judicial proceedings as a whole.

As indicated above, I am of the opinion that the validity of a challenged state harmless-error rule itself is a federal constitutional question. Harmless-error rules may, as the Court says, "work very unfair and mischievous results." And just concern can be expressed over the possibility that state harmless-error decisions may result

[3] The Court indeed recognizes, as does my Brother STEWART in his concurring opinion, that errors of constitutional dimension can be harmless, a proposition supported by ample precedent. See *Snyder* v. *Massachusetts,* 291 U. S. 97; *Motes* v. *United States,* 178 U. S. 458; *Haines* v. *United States,* 188 F. 2d 546; *United States* v. *Donnelly,* 179 F. 2d 227. Presumably all errors in the federal courts will continue to be evaluated under the single standard of 28 U. S. C. § 2111 as interpreted today. Certainly there is nothing in the substantive provisions of the Bill of Rights which suggests any standard for assessing the impact of their violation.

in the dilution of new constitutional doctrines because of state hostility to them. However, the record is barren of any showing that the California courts, which have been in the vanguard in the development of individual safeguards in criminal trials,[4] are using their harmless-error rule to destroy or dilute constitutional guarantees. If the contrary were the case and the harmless-error rule itself was shown to have resulted in a course of convictions significantly influenced by constitutionally impermissible factors, I think it clear that constitutional due process could not countenance the continued application of the rule.[5] And individual applications of a permissible rule would still be subject to scrutiny as to the tenability of the independent and adequate state ground. See *Thompson* v. *Louisville*, 362 U. S. 199; *Terre Haute & I. R. R.* v. *Indiana ex rel. Ketcham*, 194 U. S. 579; Note, The Untenable Nonfederal Ground in the Supreme Court, 74 Harv. L. Rev. 1375.

I thus see no need for this new constitutional doctrine.[6] Decision of this case should turn instead on the answers to two questions: Is the California harmless-error provision consistent with the guarantee of fundamental fairness embodied in the Due Process Clause of the Fourteenth Amendment? See *Palko* v. *Connecticut*, *supra*.

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[4] See, *e. g.*, *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905; *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361.

[5] It is clear enough that this is not the rationale that the Court is employing. The Court would leave California free to apply its harmless-error rule to errors of state law and must thus consider the rule itself consistent with constitutional due process. This leaves the anomalous situation where the impact of a particular piece of evidence is to be assessed by a different "constitutional" standard depending only on whether state law or federal constitutional law barred its admittance.

[6] *Fahy* v. *Connecticut*, 375 U. S. 85, should not be deemed dispositive on such a far-reaching matter, which was entirely passed over in the Court's opinion in that case.

Was its application in this instance by the California Supreme Court a reasonable one or was the rule applied arbitrarily to evade the underlying constitutional mandate of fundamental fairness? These issues will now be considered.

II.

The California harmless-error rule is incorporated in that State's constitution. It was first adopted by a vote of the people in 1911 and readopted as part of the revised constitution in 1966. While its language allows reversal only where there has been a "miscarriage of justice," a long course of judicial decisions has shaped the rule in a manner which cannot be ignored. California courts will not allow a conviction based upon an improperly obtained confession to stand. See, *e. g.*, *People* v. *Dorado*, 62 Cal. 2d 338, 398 P. 2d 361; *People* v. *Sears*, 62 Cal. 2d 737, 401 P. 2d 938. Nor will the fact that sufficient evidence to support the conviction is present absent the tainted evidence preclude a reversal. See, *e. g.*, *People* v. *Patubo*, 9 Cal. 2d 537, 71 P. 2d 270; *People* v. *Mahoney*, 201 Cal. 618, 258 P. 607. And reversal will be required when the tainted evidence is introduced in intentional violation of constitutional standards. See *People* v. *Sarazzawski*, 27 Cal. 2d 7, 161 P. 2d 934. Thus the California rule and the "federal rule" today declared applicable to state adjudication are parallel in these special instances[1] and their divergence, if any,

[1] Some special limitations on harmless error have always been respected by this Court and seem to me essential to the fundamental fairness guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments. These limitations stem from what I perceive as two distinct considerations. The first is a recognition that particular types of error have an effect which is so devastating or inherently indeterminate that as a matter of law they cannot reasonably be found harmless. *E. g.*, *Payne* v. *Arkansas*, 356 U. S. 560 (confessions); see *Fahy* v. *Connecticut*, *supra*, at p. 95 (dissenting opinion of HARLAN, J.); cf. *Bollenbach* v. *United States*,

arises from the general formulation found in the opinions of the California Supreme Court.

In *People* v. *Watson*, 46 Cal. 2d 818, 299 P. 2d 243, the California Supreme Court undertook a general discussion of the application of the state harmless-error rule. It declared the "final test" to be "the 'opinion' of the reviewing court, in the sense of its belief or conviction, as to the effect of the error; and that ordinarily when the result appears just, and it further appears that such result would have been reached if the error had not been committed, a reversal will not be ordered." Reversal would be required only when "it is reasonably probable that a result more favorable to the appealing party would have been reached," and this judgment "must necessarily be based upon reasonable probabilities rather than upon mere possibilities; otherwise the entire purpose of the constitutional provision would be defeated." 46 Cal. 2d, at 835–837, 299 P. 2d, at 255–256. This formulation may sound somewhat different from that announced today, but on closer analysis the distinction between probability

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326 U. S. 607 (independently sufficient evidence). The second is a recognition that certain types of official misbehavior require reversal simply because society cannot tolerate giving final effect to a judgment tainted with such intentional misconduct. *E. g.*, *Berger* v. *United States*, 295 U. S. 78 (prosecutorial misconduct). Although they have never been viewed in this light, I would see violations of *Gideon* v. *Wainwright*, 372 U. S. 335, as falling in the first category, and violations of *Tumey* v. *Ohio*, 273 U. S. 510, as falling in the second. However, as I understand my Brother STEWART's concurring opinion, he would read all such limitations into the content of the Due Process Clause and limit the application of harmless-error rules with respect to constitutional errors to an undefined category of instances. I think it preferable to resolve these special problems from an analysis of the nature of the error involved rather than by an attempt to discover limitations in the policy underlying the substantive constitutional provisions. The latter course seems to me to blur analysis and lead to distinction by fiat among equally specific constitutional guarantees.

and possibility becomes essentially esoteric. In fact, California courts have at times equated the California standard with the standard utilized by this Court in *Fahy* v. *Connecticut*, *supra*. See, *e. g.*, *People* v. *Jacobson*, 63 Cal. 2d 319, 331, 405 P. 2d 555.

Similarly, members of this Court have used a variety of verbal formulae in deciding questions of harmless error in federal cases, ranging from today's "reasonable doubt" standard to the ability to "say with fair assurance . . . that the jury was not substantially swayed . . . ." *Fiswick* v. *United States*, 329 U. S. 211. And the circuit courts have been equally varied in their expressions. See *United States* v. *Brown*, 79 F. 2d 321; *United States* v. *Feinberg*, 140 F. 2d 592; *United States* v. *McMaster*, 343 F. 2d 176.

Against this background the California rule can hardly be said to be out of keeping with fundamental fairness, and I see no reason for striking it down on its face as a violation of the guarantee of "due process."[8]

III.

A summary of the evidence introduced against the petitioners and the events of the trial will make it apparent that the application of the California rule in this case was not an unreasonable one. California courts have not hesitated to declare that comment has caused a miscarriage of justice when that conclusion has been warranted by the circumstances, see, *e. g.*, *People* v. *Keller*, 234 Cal. App. 2d 395, 44 Cal. Rptr. 432; *People* v. *Sigal*, 235 Cal. App. 2d 449, 45 Cal. Rptr. 481, but the posture of this case minimized the possible impact of the comment.

Petitioners were tried for the murder of a night club bartender in the course of a robbery of the club. The State established that petitioners were the last customers

[8] The rule was upheld by the Ninth Circuit in *Sampsell* v. *California*, 191 F. 2d 721, against an attack on its constitutionality.

remaining in the club on the night of the murder. Three people with descriptions matching those of Chapman, Teale, and the victim were seen leaving the club together. The club had been ransacked and its condition indicated that the victim had been forced out of it. He was later shot from close range with a .22-caliber weapon and left beside a country road. It was shown that Chapman had purchased a similar weapon five days before the murder and this weapon was in Teale's possession when he was arrested. Blood matching the type of the victim was found on the floormat of the vehicle in which Chapman and Teale had been traveling. Other scientific testimony established that the victim had been in petitioner's car. Blood (untypable) was found on Chapman's clothes, and blood matching the victim's was found on her shoes. Similar evidence connected Teale with the murder.

After his arrest Teale made admissions, amounting almost to a full confession, to a fellow prisoner and these were introduced against him. The jury was cautioned to disregard them as against Chapman. Petitioners pleaded not guilty, but offered no defense on the merits. The only defense witness was a Dr. Sheuerman who was called by Chapman in an effort to establish a defense of lack of capacity to form the requisite intent because of "disassociative reaction."

The prosecutor's comment on petitioners' failure to explain away or challenge the evidence presented against them was admittedly extensive.[1] The California Supreme Court found it harmless error for a number of reasons. First the court noted the convincing and unchallenged evidence presented by the State. It next

[1] The decision in *Griffin* v. *California*, 380 U. S. 609, was not announced until after the trial of the case. Hence the trial was conducted according to what was, at the time, constitutional California law. No implication of prosecutorial misconduct can be drawn from these circumstances.

observed that the jurors were certain to take notice of petitioners' silence whether or not there was comment since the evidence itself cried for an explanation. I think this point crucial, since it seems to me that this Court has confused the impact of petitioners' silence on the jury with the impact of the prosecution's comment upon that silence. The added impact of that comment would seem marginal in a case of this type where the jury must inevitably look to petitioners for an explanation of the innuendo of the real evidence and in Teale's case of his damaging admissions. Finally the California Supreme Court noted that Chapman, against whom the evidence was less strong, had keyed her defense to evidence of her mental defect, a subject upon which the comment had not touched. From this discriminating analysis it was concluded that another result was not "reasonably probable" absent the erroneous comments.

I cannot see how this resolution can be thought other than a reasonable, and therefore constitutional, application of the California harmless-error rule.

IV.

When we consider how little is empirically known about the workings of a jury, see Kalven & Zeisel, The American Jury, *passim*, it seems to me highly inappropriate for this Court to presume to take upon itself the power to pass directly on the correctness of impact evaluations coming from 50 different jurisdictions. Juries must invariably react differently to particular items of evidence because of local predispositions and experience factors. The state courts, manned by local judges aware of and in touch with the special factors affecting local criminal trials, seem the best, and the constitutionally required, final authority for ruling on the effect of the admission of inadmissible evidence in state criminal proceedings, absent the application of a fundamentally unfair rule, or

any unreasonable application of a proper rule manifesting a purpose to defeat federal constitutional rights. Once it appears that neither of these factors is present in a state harmless-constitutional-error decision, federal judicial responsibility should be at an end. This decision, however, encompasses much more. It imposes on this Court, in cases coming here directly from state courts, and on the lower federal courts, in cases arising on habeas corpus, the duty of determining for themselves whether a constitutional error was harmless. In all but insubstantial instances, this will entail a *de novo* assessment of the entire state trial record.

For one who believes that among the constitutional values which contribute to the preservation of our free society none ranks higher than the principles of federalism, and that this Court's responsibility for keeping such principles intact is no less than its responsibility for maintaining particular constitutional rights, the doctrine announced today is a most disturbing one. It cuts sharply into the finality of state criminal processes; it bids fair to place an unnecessary substantial burden of work on the federal courts; and it opens the door to further excursions by the federal judiciary into state judicial domains. I venture to hope that as time goes on this new doctrine, even in its present manifestation, will be found to have been strictly contained, still more that it will not be pushed to its logical extremes.

I respectfully dissent.